DOCKET

(1)

No. 88-7164-CSY
Status: GRANTED

Title: Terry Brice Horton, Petitioner
v.
California

Docketed:
May 6, 1989

Court: Court of Appeal of California,
Sixth Appellate District

See also:
89-1221

Counsel for petitioner: Drous,Juliana

Counsel for respondent: Kaye,Martin S.

Entry	Date	Note	Proceedings and Orders
1	May 6 1989	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jun 7 1989		DISTRIBUTED. June 22, 1989
4	Jun 19 1989	F	Response requested -- BRW.
5	Sep 1 1989		Brief of respondent California in opposition filed.
6	Sep 6 1989		REDISTRIBUTED. September 25, 1989
8	Sep 29 1989		REDISTRIBUTED. October 6, 1989
10	Oct 10 1989		Petition GRANTED.
			**********
11	Oct 19 1989	G	Motion of petitioner for appointment of counsel filed.
12	Oct 30 1989		DISTRIBUTED. Nov.3, 1989. (Motion for appointment of counsel).
13	Nov 6 1989		Motion for appointment of counsel GRANTED and it is ordered that Juliana Drous, Esq., of San Francisco, California, is appointed to serve as counsel for the petitioner in this case.
14	Nov 13 1989		Joint appendix filed.
16	Nov 17 1989		Order extending time to file brief of petitioner on the merits until November 30, 1989.
17	Nov 30 1989		Brief of petitioner Terry B. Horton filed.
20	Dec 15 1989		Brief amici curiae of Americans for Effective Law Enforcement, Inc., et al. filed.
19	Dec 18 1989		Order extending time to file brief of respondent on the merits until January 8, 1990.
21	Jan 5 1990		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 21, 1990. (2ND CASE)
22	Jan 5 1990		Brief of respondent California filed.
23	Jan 8 1990		Brief amicus curiae of United States filed.
24	Jan 17 1990		CIRCULATED.
25	Feb 5 1990	X	Reply brief of petitioner Terry B. Horton filed.
26	Feb 7 1990		Record filed.
		*	5 vol.-CAAD 6-February 7, 1990.
28	Feb 21 1990		ARGUED.

1PP

PETITION FOR WRIT OF CERTIORARI

No. 88-7164

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

TERRY BRICE HORTON

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

Supreme Court, U.S.
FILED
MAY 06 1989
JOSEPH F. SPANIOL, JR.
CLERK

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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Counsel of Record
for Petitioner

Petitioner Terry Brice Horton respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal on the State of California, Sixth Appellate District, Case No. H002742, H004177, entered on November 30, 1988, affirming the judgment of conviction of the criminal charges against him.

QUESTIONS PRESENTED

1. Must property be inadvertently discovered if not listed in a search warrant?

ORDERS BELOW

The opinion of the Court of Appeal affirming the judgment of conviction of the criminal charges against petitioner is reproduced in the appendix hereto at A-1.

The order of the California Supreme Court denying review of the Court of Appeal judgment is reproduced in the appendix hereto at A-2.

JURISDICTION

The order of the Supreme Court of California denying review of the Court of Appeal judgment was entered on March 15, 1989. This petition for writ of certiorari is timely filed within sixty days of that date.

The jurisdiction of this Court is involved under 28 U.S.C. 1257(3).

STATUTES AND CONSTITUTIONAL AUTHORITIES INVOLVED

This case involves the Fourth and Fourteenth Amendments to the United States Constitution, which provide in relevant part as follows:

Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

> (N)or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 15, 1985, an information was filed in the Santa Clara County Superior Court against petitioner charging him with one count of robbery (Penal Code section 211-213.5), one count of false imprisonment (Penal Code section 237), one count of possession of a concealable firearm by a felon (Penal Code section 12021(a)), and one count of possession of a firearm (Penal Code section 12020(a)). (C.T. 207-208).

At the conclusion of a preliminary examination heard on August 23, 1985, the magistrate granted petitioner's motion to suppress evidence on the basis that items seized were not listed in the search warrant. (C.T. 165). This order was reversed by the Superior Court on a motion to reconsider made by the prosecution. (C.T. 194).

Jury trial commenced on October 7, 1986. (C.T. 320). The following testimony was taken:

Erwin Paul Wallaker transported funds and collector's coins from a coin show held on January 13, 1985, to his home. (R.T. 57-59). As he walked to the rear of his garage, he was surprised by a masked individual with a gun. (R.T. 80). Shortly thereafter, another person appeared who hit him with a shocking device. (R.T. 86). After being thrown to the ground, he was shocked with an electrical device. (R.T. 87-88). A wedding band, a diamond and

ruby ring, a third ring, and two wallets were taken from Mr. Wallaker (R.T. 91), and jewelry was taken from a cabinet and a safe. (R.T. 101).

Initially, Mr. Wallaker was unable to identify the perpetrators of this robbery. (R.T. 248). However, the day after the incident, he informed a police officer that during the night he recognized the voice of one of the assailants as that of petitioner. (R.T. 263).

On January 13, 1985, a search warrant was obtained for a search of petitioner's residence. During the execution of this warrant the officers seized an Uzi, a revolver, two stun guns and keys for handcuffs, none of which was described as property to be seized in the warrant. (R.T. 253-255).

Jury trial commenced on OCtober 7, 1986. Guilty verdicts were returned on all counts on October 20, 1985 (C.T. 362-363). On November 17, 1986 petitioner was sentenced to state prison for a term of eight years and eight months. (C.T.. 431).

On November 18, 1986, petitioner filed a notice of appeal of the judgment. Following briefing and oral argument, the Court of Appeal for the Sixth District filed its decision on November 30, 1988, affirming the judgment of conviction. As to the issue addressed herein, the California Appellate Court concluded that the portion of Coolidge v. New Hampshire (1971) 403 U.S. 443, which dealt with the inadvertence requirement of the plain view doctrine was signed by only four members of this Court and hence was not actually decided and thus has no precedential effect on this point. (Opinion, p.10).

On March 15, 1989, the California Supreme Court denied petitioner's petition for review.

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REASONS FOR GRANTING THE WRIT

I. The Judgment of the California Court Of Appeal Allowing Property Not Described In A Search Warrant To Be Seized Without A Showing That The Property Was Inadvertently Seized Is In Tension With This Court's Decision In Coolidge v. New Hampshire.

In Coolidge v. New Hampshire, (1971) 403 U.S. 443, 466, 91 Sup.Ct. 2022, 29 L.Ed. 2d 564, this Court addressed the problem of identifying "the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal." (Id. at 466). Specifically, the Court ruled

> "(i)f the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of warrants...particularly describing... (the) things to be seized."

The Court explained that

> "where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it,...(t)he requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of 'exigent circumstances.'" (Id. at p.470).

Thus, plain view alone is never enough to justify the warrantless seizure of evidence. To seize evidence not particularly described in the warrant, it must be inadvertently found. (Id. at 474.)

The California Appellate Court ignored this Court's language requiring inadvertence before unlisted property could be seized stating that Coolidge has no precedential effect in that the opinion was signed by only four members of this Court. However, in Texas v. Brown (1983) 460 U.S. 730, 746, 103 Sup.Ct. 1535, 75 L.Ed 2d 502, this Court implicitly accepted the plurality view from Coolidge recognizing that the lower courts generally have applied the Coolidge discussion of "plain view." (Id. at 737.) There is "no reason at this late date to imply criticism of (Coolidge's) articulation of the (plain view) exception. It has

been accepted generally for a decade."

This view was once again voiced in Arizona v. Hicks (1987) 480 U.S. 321, 107 Sup.Ct. 1149, 94 L.Ed 2d 347. There, Justice O'Connor in a dissenting opinion stated:

> "Second, the officer must discover incriminating evidence, 'inadvertently' ...[T]here three requirements have never been expressly adopted by a majority of this Court, but 'as the considered opinion of four members of this Court (the Coolidge plurality) should obviously be the point of reference for further discussion of this issue.

(Id. at 1157.)

Each of the Circuit Courts of Appeal have followed the plurality decision of Coolidge requiring inadvertence before property not listed in a warrant may be seized. (See Emery v. Holmes (1987 1st Cir.) 824 F.2d 143, 148: United States v. Escobar (1986 2nd Cir.) 805805 F.2d 68,71; United States v. Meyer (1987 3rd Cir.) 805 F.2d 68, 71; United States v. Owens (1988 4th Cir.) 848 F.2d 462, 471 fn.8); United States v. Espinoza (1987 5th Cir.) 826 F.2d 317, 319; United States v. Beal (1987 6th Cir.) 810 F.2d 574, 576; Perlman v. Chicago (1986 7th Cir.) 801 F.2d 262, 265); United States v. Ellison (1986 8th Cir.) 793 F.2d 942, 948; United States v. Limatoc (1987 9th Cir.) 807 F.2d 792, 795; Martinez v. Turner (1972 10th Cir.) 461 F.2d 261, 264-265; United States v. Blum (1985 11th Cir.) 753 F.2d 999, 1002; United States v. Williams (1987 D.C. Cir.) 822 F.2d 1174, 1182 fn. 82.)

This case demonstrates the need for this Court to clarify whether the states are bound to accept the inadvertence requirement as expressed in Coolidge. The necessity to obtain a warrant pursuant to the Fourth Amendment would be meaningless without this requirement.

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CONCLUSION

A warrant must specifically describe all items to be seized so that nothing is left to the discretion of the officer when executing the warrant. (Lo-Ji Sales, Inc. v. New York (1979) 442 U.S. 319, 325, 99 Sup.Ct. 2319, 2324, 60 L.Ed. 2d 920, 927-28.) Allowing the seizure of property not listed in a warrant which is not inadvertently found undermines the warrant requirement. Where discovery is anticipated, where the police know in advance the location of evidence and intend to seize it and still fail to describe the property to be seized in the warrant, there is a violation of the express constitutional requirement of "warrants ... particularly describing ...(the) things to be seized."

Grant of certiorari of the instant petition will permit the Court to protect the very important right of the warrant requirement of the Fourth Amendment. Accordingly, the Court should grant the petition and issue the writ of certiorari requested.

DATED: May 4, 1989

Respectfully Submitted,

JULIANA DROUS
Counsel of Record
for Petitioner

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FILED
NOV 30 1988
Court of Appeal - Sixth App. Dist.
DEPUTY

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TERRY HORTON,

Defendant and Appellant.

No. H002749
(Santa Clara County
Sup.Ct.No. 101741)

In Re TERRY HORTON on Habeas Corpus.

No. H004177

Appellant Terry Horton was charged with residential robbery (Pen. Code, §§ 211-213.5), false imprisonment (§§ 236-237), possession of a concealable firearm by an ex-felon (§ 12021, subd. (a)) and possession of a short barrelled Uzi machine gun (§ 12020, subd. (a)). A jury found him guilty on all counts and found the allegation true that he had personally used the Uzi in the commission of the offenses charged in counts I and II. He was sentenced to eight years eight months in state prison. He appeals the judgment of conviction, raising these contentions:

1. Property was illegally seized from his home;

2. He received ineffective assistance of counsel;

3. There was prosecutorial misconduct; and

4. He was improperly sentenced.

In connection with the second of these contentions Horton has filed a petition for a writ of habeas corpus. We will consider the writ petition in our discussion of issues involving ineffective assistance of counsel.

We affirm the judgment of conviction and deny the writ petition.

FACTUAL BACKGROUND

The Robbery

Erwin Paul Wallaker (Wallaker) was the treasurer of the San Jose Coin Club. His duties included collecting the revenues generated by the club's annual coin show. In 1985 the show was held on January 11, 12 and 13 at the San Jose Convention Center. At the end of the third day, a Sunday, Wallaker left the convention center with approximately $10,000 in cash and currency in one briefcase, approximately $20,000 in collector coins of his own in another briefcase and approximately $1,200 on his person. He placed the briefcases in the trunk of his car.

Wallaker proceeded directly home, arriving around 6:30 p.m. He backed his car into the driveway, activated the garage door opener, and entered the garage on foot. Toward the rear of the garage he was surprised by two men wearing Halloween masks which covered their heads. One held a machine gun and the other a "stunning" device. The first man demanded money while the second administered a series of shocks with the stun gun. Wallaker was eventually forced to the floor and handcuffed. He nonetheless attempted to keep the two men talking, because he had noticed that the first one had a strong southern accent which sounded familiar to him. This man was of medium height and build. Both men wore dark clothes.

The second assailant removed three rings Wallaker was

wearing and took his billfold and credit card case while the first held the machine gun on him at close range. Wallaker's feet were bound and he was hogtied, gagged and partially blindfolded.

The man with the machine gun wanted to know where the rest of the money was. Wallaker pointed out a safe in the garage and one of the men removed the contents, consisting of several rings belonging to Wallaker's wife, some uncut rubies and a wristwatch. At some point the man with the stun gun produced a blue-steel short-barreled revolver. He rubbed it up against Wallaker's face, shone the flashlight on it and threatened to use it.

The robbers demanded the car keys and eventually located them where Wallaker had tossed them. Wallaker heard the car door open and close, which prompted him to renew his efforts to make noise in the hopes of attracting help. This precipitated further threats from one of the assailants who returned to the garage, hit Wallaker over the head, and dragged him back further from the garage door. Wallaker heard the car door open and close again and then silence.

He wriggled toward the front of the garage, yelling for help, and was able to attract the attention of three passersby. These three people came to his aid and called the police. The robbers had run off.

The police arrived at approximately 7:00 p.m. Wallaker gave a statement and then was taken to emergency where he received several stitches on the back of his head.

The three rescuers also gave statements. Lisa Miller, James Burwell and Jeff Beaulieu were walking along the street where Wallaker lived when a man rushed past them coming from the direction of Wallaker's house. The man was walking hurriedly, hunched over with his head down. He was of medium build and had longish gray-white hair. He was carrying something under his right arm which Miller thought was a gun and the others thought might be an umbrella.

The Search of Defendant's House

Sometime in the early hours of the morning after the robbery, Wallaker realized that he recognized the voice of the man with the southern accent as that of Terry Horton. Wallaker knew Horton as a fellow coin collector. He had seen Horton at various coin club meetings over the course of approximately five years and the two had spoken to each other on perhaps two dozen occasions. He had recently talked with Horton at a meeting approximately three weeks prior to the robbery. And he had noticed Horton in attendance at the coin show on the Sunday of the robbery.

Wallaker contacted the police with this information the morning after the robbery. He met with Sergeant Gary Larault and made a positive ID of Horton from a mug shot. Larault then prepared a photo lineup and contacted Miller, Burwell and Beaulieu. Lisa Miller identified a picture of Horton as the man she had seen that night. The other two were not able to make an identification.

On January 28, 1985, a search warrant issued, authorizing the search of Horton's house for articles taken in the robbery. The eight-page police report of the crime was appended to the affidavit supporting the search warrant.

The Horton house was searched January 30, 1985. An Uzi machine gun, with a long and a short barrel and loaded clips, and a loaded blue-steel .38 caliber revolver were found in the master bedroom. On a bookshelf in the dining room were two Nova XR 5000 stun guns in operating condition. A set of handcuff keys, an announcement advertising the San Jose Coin Club show, and some clothes were also removed. None of the items stolen from Wallaker's person or from his garage safe was recovered from the house; nor were any Halloween masks found.

Horton surrendered himself on June 10, 1985, after a warrant issued for his arrest.

Witnesses for the Prosecution

Wallaker testified that the Uzi machine gun, the blue-steel .38 revolver and the Nova stun gun appeared to be the weapons used against him during the burglary.

Wallaker was an ex-Air Force pilot. As a pilot he had been trained in voice identification. He had a practiced ear and was used to listening carefully to people's voices. He was 100 percent certain that the voice of the man who robbed him was Horton's.

The stun gun had produced numerous red welts on Wallaker's back. James Scroggins, an expert on stun guns, testified that

the only stun gun on the market in January of 1985 which would have caused the effects described by Wallaker was the Nova XR 5000.

Wallaker testified that when he had seen Horton several weeks before the robbery, at a coin club meeting, Horton had shoulder length gray hair. He also thought Horton's hair was gray when he glimpsed Horton at the coin show on the day of the robbery. Officer Larault testified that when Horton surrendered himself on June 10, 1985, he took Horton's picture. That picture was admitted into evidence and showed Horton with shoulder length gray hair.

Lisa Miller and James Burwell testified that the man they saw hurrying from the direction of Wallaker's house the evening of the robbery had collar or shoulder length gray hair, and a medium build. Miller testified that at the time she picked Horton's picture from the photo lineup shortly after the robbery, she was "pretty certain" that was the man she had seen. At trial she was unable to say whether Horton was the man she had seen that night or not.

The Defense

Horton's defense was an alibi. He testified that at the time of the robbery he was at home watching TV and playing cards. His wife, his son, his daughter and two friends corroborated this testimony.

Horton, his wife, and his daughter Cathy all gave substantially the same account of events on January 13, 1985.

Around noon they went to the coin show, together with Cathy's boyfriend Jim Nash. They stayed until approximately 3:30 p.m. and then returned home. Jim and Cathy went out to get pizza and the four ate dinner together and then played cards. Two friends of the family, Vernon Burgess and Joe DeAngelo, dropped by and Horton's son Terry came home during a break from work. All of these witnesses remembered that "60 Minutes" came on the TV while they were at the Horton house because Horton and Jim Nash argued about whether to watch it or not. That show starts at 7:00 p.m.

Terry Jr. was at work that night. He punched out at 6:46 p.m. and went home to feed his puppy. He arrived home shortly before 7:00 and found the others there playing cards with the TV on. Terry's friend Joe DeAngelo dropped by at about the same time. Vernon Burgess testified that he came by the Hortons' that night around 6:30 to borrow money to go to his father's funeral. Horton loaned him the money and he stayed the whole evening.

The defense stressed that Horton's hair had not been long and gray at the time of the robbery. Various witnesses testified that Mrs. Horton had applied a rinse to Horton's hair in late December which had turned his normally white hair to a blond-brown with red highlights. Burgess remembered this in particular because Mrs. Horton had done the same rinse on his hair at the same time and it was too red. San Jose coin dealer Sheldon Wirt testified that he talked with Horton briefly at the coin show on Sunday and that Horton's hair was a

reddish-orange color on that day. Finally, Horton's brother John testified that Horton's hair was brownish-blond and somewhat short in January of 1985. He remembered because it was such a contrast from the previous month when his hair had been white on the occasion of his son's wedding. Horton testified that his hair had been silvery-white for his son's wedding in December of 1984. Shortly thereafter his wife had given his hair a red rinse. By June, when he surrendered himself to the police, the rinse had washed out and his hair color had returned to its natural gray-white.

There was evidence that Horton was an avid gun collector and that various family members enjoyed target shooting at the rifle range. Cathy Horton testified that her dad had given her the .38 for her protection when she had lived away from home. The stun gun was also for her protection, since she came home late from a night class at San Jose State. Mrs. Horton owned several guns. She testified that Horton had given her the Uzi and that it was a collector's item. Horton's brother John testified that he and his brother had each bought stun guns for use by female family members.

Horton took the stand and recounted the events of January 13, 1985, as we have summarized above. He denied any involvement in the crime. He stated that he had not seen Wallaker at any coin club meeting in December of 1984. He knew Wallaker and testified that he had noticed him at the January coin show. He described two incidents involving Wallaker, both of which occurred in 1975 or 1976. Horton's 10-year-old

daughter had bought some coins from Wallaker which Horton felt were overpriced and overgraded. He argued with Wallaker and threatened to inform the president of the club if Wallaker did not buy back the coins. Eventually Wallaker refunded his daughter's money. The second incident occurred at another coin show. Wallaker was talking to several people and Horton attempted to interrupt him to ask a question. Wallaker ignored him and Horton made a disparaging remark, at which Wallaker took offense. Horton surmised that Wallaker was implicating him in the robbery because of bad feelings stemming from these incidents.

Defense introduced a brochure from the coin show, with the purpose of demonstrating that anyone attending that show could have "cased" Wallaker for a later robbery. The brochure listed the officers of the sponsoring San Jose Coin Club, including Wallaker as treasurer, and also showed a layout of the floor, indicating where each dealer's table was. Wallaker's table was identified on this diagram.

DISCUSSION

I. SEIZURE OF EVIDENCE DURING THE WARRANT SEARCH

At the conclusion of the preliminary hearing defense moved to suppress all evidence seized during the warrant search on the ground that the warrant authorized a search only for those items stolen during the robbery. The magistrate granted the motion to suppress and held Horton to answer. The information was filed in superior court, after which the People moved to

reverse the magistrate's order. A hearing was held on September 23, 1985, and the superior court granted the People's motion.

The search warrant instructs the finder to search Horton's house for "the items described and sketched on the attached 'San Jose Police Department Property Report'". This report describes only the three rings Wallaker was wearing and the ring, watch and rubies taken from the safe.

Horton's argument is two-fold: Seizure of evidence not listed in the search warrant cannot be justified under the so-called "plain view" doctrine because discovery of these items was not "inadvertent"; and the police officers could not show a sufficient connection between the items seized and criminal activity.

The Inadvertence Requirement

Horton relies primarily upon Coolidge v. New Hampshire (1971) 403 U.S. 443 in arguing that items not listed in the warrant may be seized only if discovered inadvertently. He contends that the police in this case expected to find weapons in his home and intended to seize them.

The California Supreme Court, in North v. Superior Court (1972) 8 Cal.3d 301, observed that the portion of the Coolidge opinion which proposed this restriction of the plain view doctrine was signed by only four members of the court, with four expressly disagreeing. Hence the issue was not actually decided and Coolidge has no precedential effect on this point. (Id. at pp. 307, 308.)

California cases cited by Horton (People v. Albritton (1982) 138 Cal.App.3d 79 and People v. Murray (1978) 77 Cal.App.3d 305) follow Coolidge without addressing the impact of North. As we announced in People v. Miller (1987) 196, Cal.App.3d 846, "[w]e are persuaded that the Supreme Court specifically rejected the inadvertence requirement in North, and, consequently, we are bound by stare decisis to follow the Supreme Court's position on this issue." (Id. at p. 851.)

In short, there is no 'inadvertence' requirement in California. "[T]he fact that the officer had foreknowledge of the presence of the evidence in that place is of no constitutional significance." (Ibid.)

The Nexus Requirement

In Arizona v. Hicks (1987) 107 S.Ct. 1149, the U.S. Supreme Court determined that the police may not seize property in plain view unless the officer has probable cause to believe that the item in question is evidence of a crime or contraband. As expressed by the California Supreme Court, the officer must be "presently aware of some specific and articulable fact from which a rational link between the item seized and criminal behavior can be inferred." (People v. Superior Court (Meyers) (1979) 25 Cal.3d 67, 73.)

Horton takes the position that this "nexus" was not present here. This argument goes as follows: At the time of the search the police did not know that Horton was an ex-felon. The handgun by itself was therefore not contraband. Neither

were the coin show advertisement, the handcuff keys or the clothes. The Uzi was concealed in a gun case; since the short barrel was not attached at the time it was found, it was also not contraband.

This argument is without merit. The eight-page police crime report, which described the robbery in considerable detail, was attached to the affidavit supporting the search warrant. Sgt. Larault, who executed the warrant, testified that he was fully apprised of the details of the robbery. On the basis of the information contained in the police report, law enforcement officers conducting the search selectively seized only those items of evidence they believed to be weapons or articles used in the commission of the robbery. Although numerous other handguns and rifles were located at the residence, they were not seized because there was no "nexus" to this crime.

Authorities offered by Horton in support of his position are inapposite. In People v. Murray, supra, 77 Cal.App.3d 305, police seized two television sets not described in the warrant based upon their observations upon entering the premises of some 67 television sets, many with the serial numbers removed. The court held that these circumstances did not establish that the officers in fact knew which items were contraband and which were not. (Id. at pp. 311-312.)

Similarly in Nunes v. Superior Court (1980) 100 Cal.App.3d 915 the court invalidated the seizure of certain items taken on the general suspicion that they matched descriptions of stolen

property contained in police reports not in the searching officer's possession.

Clearly these cases are not on point. The officers in our case were in possession of the police report describing the crime and their search was directed to items connected to that crime. There is no indication that they used the warrant as a pretext to conduct a general exploratory search of Horton's residence.

II. COMPETENCE OF COUNSEL

The contentions in this section present the question whether Horton received effective assistance of counsel. In addition, in the following section regarding claimed prosecutorial misconduct, Horton contends that his attorney was inadequate in certain instances in failing to assert timely objections. In general terms Horton complains that trial counsel should have kept from the jury inadmissible evidence which impugned his character and tainted the entire case against him. The appeal and accompanying habeas petition raise identical issues. We will discuss them together while reserving some comments on the writ petition at the conclusion of section III.

In order to prevail on a claim of ineffective assistance of counsel, an appellant has the burden of proving by a preponderance of the evidence that (1) counsel's representation was deficient in that it fell short of prevailing professional standards of reasonableness, and (2) there is a reasonable

probability that but for counsel's errors the result of the case would have been different. (People v. Ledesma (1987) 43 Cal.3d 171, 215-218; Strickland v. Washington (1984) 466 U.S. 668, 687.) Even if the burden is met in the first step, the claim is not proved unless the required prejudice is shown.

Failure to Stipulate to the Prior Conviction

Horton was charged in Count III with possession of a firearm by an ex-felon (Pen. Code, § 12021, subd. (a)).

On the first day of trial defense counsel made two motions. First he sought to have the prior offense tried separately from the present offenses. Secondly, he sought to exclude use of the prior offense for impeachment purposes on the ground that the prior was too remote to have any probative value. The court denied both motions.

By virtue of the reading of the information, the jury was informed that the charges against Horton included an allegation that he had been convicted of a burglary in Tennessee. When Horton took the stand defense counsel asked him about the prior conviction. He testified that in 1967 in Memphis, Tennessee, he had pleaded guilty to three counts of third degree burglary, possession of burglary tools, and burglary and larceny of an automobile. At that time he was 35.

Horton argues that, rather than let in this evidence, counsel should have stipulated to his ex-felon status for purposes of establishing the necessary element of Count III. By so doing he could have kept the details regarding the nature

of the prior conviction from the jury. Such a procedure was expressly sanctioned by the Supreme Court in the case of People v. Valentine (1986) 42 Cal.3d 170. In Valentine the high court considered the effect of Proposition 8 on the rule laid down by People v. Hall (1980) 28 Cal.3d 143. Hall had held that when a prior conviction is pertinent only to ex-felon status as an element of a currently charged offense, the jury may not learn either the fact or the nature of the prior conviction if defendant offers to stipulate he is an ex-felon.

Proposition 8 was passed by the voters in 1982, adding section 28 to article I of the state Constitution. The second sentence of subdivision (f) of this section, apparently directed at Hall, provides that "[w]hen a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court."

In Valentine, defendant offered to concede his prior convictions for purposes of establishing that element of a Penal Code section 12021, subdivision (a) charge; however, the trial court ruled that section 28, subdivision (f) required full disclosure of the nature of the priors in open court. The Supreme Court found that ruling to be error. Any prior felony, regardless of its nature, satisfies the ex-felon element of the offense. The nature of the prior is therefore not relevant evidence. (Valentine, supra, 42 Cal.3d at pp. 176-177.) The court concluded that Proposition 8 does not require the nature of prior convictions to be proven to the jury if defendant stipulates to his ex-felon status. (Id. at pp. 181-182)

It is apparent from the record that Horton's attorney was unaware of the Valentine decision, which was handed down July 21, 1986, approximately 10 weeks prior to the start of trial on October 7. The following exchange ensued during the discussion of counsel's motions.

"The Court: . . . The constitution prevents you from stipulating to the status part of the crime in order to keep the proof of the prior out of the record.

"Mr. Mansfield [Defense Counsel]: Yes.

"The Court: Prop. 8 truth in evidence law clearly makes, gives the prosecutor the right and the authority and the duty to prove prior convictions where they constitute an element of the offense. So I don't believe I have a lot of choice in that matter."

Because the judge thought that the nature of the prior would have to be disclosed in open court, he saw no point in granting counsel's motion to keep the prior out for purposes of impeachment. He did, however, comment that "if the prior were discharged for enhancement I would be disposed to give you a protective order because a 23 year old prior would have very little probative value on questions of impeachment, but I don't think I have a lot of discretion in the matter."

Thus it appears that the nature of the prior conviction would not have come in at all, either in connection with the section 12021 offense or for purposes of impeachment, had counsel made the stipulation provided for by Valentine.

But we cannot find that counsel's omission prejudiced his

client. Under Valentine, the jury would still have been informed of the bare fact that Horton had a prior felony conviction. While it forestalls the direct introduction of possibly prejudicial evidence, the Valentine stipulation creates a perhaps greater risk of harm. As the court observed in People v. Rollo (1977) 20 Cal.3d 109, 119: "[I]t is highly unlikely that a jury which is advised only that the defendant has been convicted of 'a felony' will let the matter rest. Normal human curiosity will inevitably lead to brisk speculation on the nature of that conviction, and the range of such speculation will be limited solely by the imaginations of the individual jurors. Some may assume, for example, that the defendant's prior conviction was similar to or identical with the charge for which he is on trial. Others may speculate that the conviction involved some form of unspeakable conduct, such as torture murder, gang rape, or child molestation. Why else, the jurors might naturally ask, was the name of the crime withheld from them?" (Id. at p. 119, fn. omitted.)

Valentine is thus a double-edged sword. It may well be advisable to "sanitize" the prior where that conviction was for the same crime (or a worse one), committed recently, as was the case in Valentine. On the other hand, where defendant's prior is remote and for a crime different from the one charged, as in Horton's case, Valentine cuts the other way. In such a case it may behoove a defendant to make a clean breast of it before the jury and demonstrate that he has nothing to hide, rather than allow the jurors to speculate about the nature of his prior conviction.

We cannot say that reasonably competent defense counsel, with knowledge of Valentine would necessarily have chosen to stipulate to his client's ex-felon status in this case. Consequently, we cannot find that the error here requires reversal. Moreover, any prejudicial effect was minimized by the remoteness of the prior as well as by limiting instructions given to the jury regarding the use of the evidence.

The Tape Recording

As part of the People's case in rebuttal, the District Attorney introduced into evidence a tape recording of telephone conversations between Sgt. Larault and Horton's wife and between the sergeant and Horton himself. The first part of the tape was played without objection.

In a conversation on March 21, 1985, Larault asked Mrs. Horton whether she went to the coin show Sunday, January 13. She responded that she had been advised by her husband's lawyer not to answer any questions. Sgt. Larault informed her that she was not bound to follow the advice of her husband's lawyer. He suggested that she call the lawyer and discuss the matter with him and that he, Larault, would do the same, after which he would call her back. In the next conversation, March 23, Mrs. Horton told Larault that she went to the coin show that Sunday. She could not, however, remember any specific times or details regarding her activities after the show. She asked Larault why he was questioning her. Whereupon Sgt. Larault began to explain to her the various events leading up to the

issuance of the search warrant and the search of the residence.

At some point in this monologue, defense counsel objected on the basis that the recorded material did not rebut any witness testimony. The court asked counsel: "Have you gone over this tape to determine if parts should be excised . . . ?" Counsel responded, "No, I am prepared to do so. I never thought we were going to hear these tapes, frankly." The court then dismissed the jury in order to discuss with counsel whether portions of the tape might be deleted.

Out of the presence of the jury the first portion of the tape was replayed. Counsel objected to the introduction of Sgt. Larault's statements and the judge agreed to admonish the jury that the taped conversations were to be considered only for the statements of Mrs. Horton, and that the officer's statements were to be disregarded except where they gave meaning to Mrs. Horton's responses.

Defense counsel lodged a continuing objection to use of the tape on the basis that it was improper rebuttal evidence. The jury was called back, given the requested admonishment, and the tape was started from the beginning of the conversation.

At the end of the conversation with Mrs. Horton, Horton came on the line. There ensued a conversation where Horton demanded the return of property seized from his house by the police, and Officer Larault explained that certain property had been possessed illegally: namely the Uzi with the short barrel, and an impermissible quantity of marijuana. Horton protested that the marijuana was for home consumption by all five resi-

dents, whereupon the officer responded that the presence of some scales indicated that marijuana was being weighed and sold there.

Horton was unable to give any more details about the timing of his activities on January 13. He did, however, offer to meet with Larault, in the presence of his attorney. The conversation ended with Larault saying "You have nothing to hide[,] right?" and Horton responding: "I don't want to help you tidy up a circumstantial case against me . . . ."

Horton raises the following points concerning counsel's handling of the tape recording: 1) Counsel should have reviewed the tape before it was played to the jury; 2) He should have either made an in limine motion to exclude the entire tape as inadmissible hearsay or moved to exclude it under Evidence Code section 352; 3) If certain parts of the tape were admissible as prior inconsistent statements of Mrs. Horton, counsel should have stopped the tape when the conversation with Mrs. Horton was over.

The tape was apparently offered to rebut testimony that the police had unreasonably harassed the Horton family. For example, in her testimony on cross-examination, Mrs. Horton had denied that Officer Larault encouraged her to talk to her husband's lawyer before answering his questions. And Horton stated several times in his testimony that the police had bothered his wife at work and harassed his whole family. In addition he had insinuated that the police had stolen property from his house during the warrant search. The taped material

was relevant for rebuttal purposes, not only because it contained prior inconsistent statements of Mrs. Horton, but also because it tended to show that the tone of the officer's questioning was not intimidating and it explained why certain property had not been returned. Any prejudice occasioned by the officer's spontaneous statements about the law was slight and was further mitigated by the court's admonition that Larault's statements were not to be considered as evidence.

Horton claims that the bulk of the material on the tape was not relevant for any proper rebuttal purpose and was extremely prejudicial; consequently it would have been excluded had counsel raised an objection on those grounds under Evidence Code section 352. The parts he finds most objectionable are the officer's references to the marijuana found in the house and his own statement that he did not intend to help the police tidy up a circumstantial case against him.

In regard to the mention of marijuana and scales taken from the house, previous testimony during the case in chief had established quite clearly that Horton's son was selling marijuana and that those items had been found in his room. Therefore this information could have very little added prejudicial effect. As to his comment that he did not want to help police tie up a case against him, this constituted an admission and was consequently admissible under Evidence Code section 1220 in any case.

In conclusion we agree that reasonably competent defense counsel would have previewed a tape recording in which a

defense witness and defendant himself engaged in conversation with a police officer, and should have been prepared to interpose objections to its admission before it was played to the jury. The Attorney General argues that defense counsel here did in fact preview the tape and simply decided the material was relatively innocuous. We are unable to determine from the record whether counsel was aware of the contents of the tape or not. But it makes no difference, since we find that the taped material was admissible for purposes of impeachment and as an admission. As to the rest any prejudice was minimal, and the jury was duly admonished.

III. PROSECUTORIAL MISCONDUCT

Horton argues that the prosecutor engaged in a number of incidents of misconduct which prejudiced the jury against him. In those instances where no objection was made, he argues that an objection followed by an admonition would not have cured the error. (People v. Perez (1962) 58 Cal.2d 229, 250.) In the alternative, if an admonition would have cured the error, he contends that counsel was ineffective in not raising the objection. In cases where counsel did object and an admonition was given, he argues that the prejudice was nonetheless not dispelled.

The first two instances involve evidence elicited at trial regarding marijuana in the Horton household and Horton's employment at a methadone clinic, the claim being that the prosecutor was deliberately trying to portray Horton and his

family as drug addicts. The second two incidents occurred during closing argument and involve the prosecutor's use of Horton's tape recorded statements, and his characterization of Horton and the alibi witnesses as perjurers.

The Marijuana Evidence

This evidence came out in the following way. Horton's son Terry junior was called as a witness during the People's case in chief. In the course of establishing the ownership and location of the various guns in the house, he was questioned about events that took place the day Sergeant Larault executed the search warrant. On cross-examination, defense counsel asked him: "You were arrested by Sergeant Larault as an accomplice in this case, weren't you?" He answered "Yes, I was." He then testified that his hands were handcuffed behind his body, that Sgt. Larault's manner was intimidating, and that he was kept in custody for at least a half an hour. On redirect, the prosecutor asked Terry if he wasn't in fact arrested for selling marijuana, to which he replied no. The prosecutor then showed him a photo taken from his room which Terry identified as a picture of himself holding a Thai stick. Further testimony revealed that marijuana and scales had been found in Terry's room. On recross, Terry stuck to his testimony that Sgt. Larault had arrested him as an accomplice. He denied that he had been selling marijuana.

When Sgt. Larault took the stand he described in some detail the evidence of marijuana found in Terry's room,

including two "bricks" of marijuana. The judge interrupted this testimony to remind the jury that the evidence they were hearing was being received "solely on the issue of credibility of Samuel [Terry] Horton . . . with regard to his statement that he was arrested as an accomplice and not for the sale of marijuana." The jury was specifically admonished.

There followed testimony by the officer that Terry had been detained while the search proceeded and that police had thought initially he might be a possible co-defendant. When marijuana was found in Terry's room, he advised Terry per Miranda, at which point Terry informed him that he used marijuana and the whole family used it, and that he sold approximately $230 worth of marijuana a week to others.

During the defense case, it was eventually established that the "bricks" of marijuana Sgt. Larault described were firecrackers, not marijuana. On the other hand, Terry admitted on the stand that he had been selling approximately $230 worth of marijuana a week. The prosecutor asked if his family knew about this and Terry answered "Yes" before an objection, which was sustained, could be interposed.

Horton contends that the prosecutor deliberately elicited inadmissible and prejudicial testimony regarding marijuana use and sale in the Horton household and that such a tactic amounts to prosecutorial misconduct. (People v. Evans (1952) 39 Cal.2d 242.) As the summary of testimony shows, however, evidence of Terry's involvement in marijuana sales was brought out only after Terry had testified that he had been arrested as an accomplice.

Horton points out that Officer Larault admitted he had initially detained Terry as a possible co-defendant; therefore his testimony in essence tended to corroborate, rather than refute, Terry's and the marijuana evidence was not necessary for any impeaching purpose. We disagree. Defense cross-examination of Terry left the impression that he had been intimidated by police and arrested for a crime he didn't commit. The prosecution was entitled to put on evidence tending to prove the contrary. The court so ruled and duly admonished the jury as to the limited use of the evidence. Evidence regarding the sale of $230 per week worth of marijuana was likewise admissible since Terry had specifically denied he was selling that amount or any amount of marijuana. In regard to the picture of Terry holding a Thai stick, that picture was stricken from evidence at counsel's request.

Because the marijuana evidence was introduced with the proper purpose of impeaching a witness' credibility, and was expressly limited to that purpose by the court's admonishment, no prosecutorial misconduct occurred here. Horton argues nonetheless that reasonably competent defense counsel would have been aware of what was found in the house and would have made an in limine motion to keep out any evidence regarding marijuana use and sales in the household because of its highly prejudicial nature. Even had such a motion been made and granted, however, the evidence would have been admissible on the issue of Terry's credibility. Finally, the prejudice resulting from the introduction of the marijuana evidence

reflected only indirectly upon Horton himself. We do not find it reasonably probable that a result more favorable to him would have occurred had this evidence been excluded. (People v. Ledesma, supra, 43 Cal.3d at pp. 215-218.)

Defendant's Employment at a Methadone Clinic

Evidence that Horton was working at a methadone clinic at the time of the robbery first came in during the D.A.'s direct examination of Terry junior as to the possible reasons why Horton possessed handcuffs Later, during his cross-examination of Mrs. Horton, the prosecutor returned to this point. When Mrs. Horton described her husband as a county employee, he pressed her for the specific information: "Well, come on, Mrs. Horton, are you just--your husband worked for the methadone clinic, right?" Counsel immediately objected and the court declared a recess.

Out of the presence of the jury the prosecutor explained that the relevance of the question was to show "we have heroin addicts." The judge sustained the objection and agreed to admonish the jury.

When court reconvened with the jury present, however, no admonishment was given. Horton argues that he was prejudiced by this incident because any knowledgable juror would conclude from the mention of the methadone that Horton had drug connections or was a heroin addict. We do not agree that these are necessarily commonly held assumptions. Moreover, when Horton took the stand he gave testimony regarding his employment. He

had worked for the county of Santa Clara since 1971 as a mental health specialist. For approximately 13 months of his 15-year tenure with the county he had been assigned to Hillview Methadone Clinic. His duties there included setting up test sheets, collecting urine specimens and logging the results, and filling out Medi-Cal forms. We believe this testimony sufficiently rehabilitated Horton and diffused any taint caused by the prosecutor's reference to the methadone clinic.

Reference to Defendant's Prearrest Silence

In closing argument the prosecutor stressed the point that two months after the robbery when Horton was being questioned by Sergeant Larault, he offered no alibi, nor any alibi witnesses, the obvious implication being that his behavior was inconsistent with that of an innocent man. These were some of his comments: "You won't find the defendant crying of his innocence on that tape--in other words, I, I've got two different occasion[s], I just don't want to help you tie up a circumstantial evidence in this case either. [¶] At that point Sergeant Larault wasn't leaning on them or being barbaric or anything saying I just want to talk to you. I just want to get some information. Perfect opportunity for them to give the information they would have given, should have given if in fact they had a decent alibi, but they don't."

Horton argues that these statements have a tendency to confuse the jury regarding the burden of proof by suggesting that the defendant must come forward to prove his innocence

rather than the prosecution proving his guilt. He claims this is an impermissible comment on a defendant's right not to speak to police, and violater the rule expressed in Griffin v. California (1965) 380 U.S. 609.

As we have noted, Horton's statement that he didn't want to help the police tie up their case against him was admissible as an admission under Evidence Code section 1220. Moreover, where a defendant fails to speak, or makes an evasive or equivocal reply, under circumstances where a reasonable person would speak, his silence may be used against him as an implied or adoptive admission, unless he was relying on his Fifth Amendment right of silence. (Evid. Code, § 1221; People v. Preston (1973) 9 Cal.3d 308, 314.)

In Jenkins v. Anderson (1980) 447 U.S. 231, the defendant, accused of murder, claimed for the first time at trial that the killing had been in self-defense. The prosecutor cross-examined him about whether, prior to the arrest, he told police about the incident. The Supreme Court held that the Fifth Amendment is not violated by use of prearrest silence to impeach a criminal defendant's credibility. (Id. at p. 237.) Under similar circumstances in People v. Free (1982) 131 Cal.App.3d 155 the court followed Jenkins in concluding that the California rule is that "[p]rearrest silence may be commented upon unless the court finds the silence was an invocation of Fifth Amendment rights." (Id. at p. 165.)

The conversation referred to here between Horton and Sergeant Larault took place well before his arrest and was not

preceded by any Miranda warnings. On the other hand, it was clear that Horton was a suspect in the case since his house had been searched and he was being questioned about events on the day of the robbery. Furthermore, it appears that he was relying upon his constitutional rights when he told Larault he would answer further questions only in the presence of his attorney. In such a case it is improper to comment upon his silence. (People v. Preston, supra, 9 Cal.3d 308, 315.)

No objection was raised here regarding the prosecutor's remarks about Horton's prearrest silence. In fact defense counsel in his closing argument urged the jury to play the end of the taped conversation between Larault and Horton and listen to his client, when confronted by Sgt. Larault, volunteer to come to the police and talk. Clearly defense counsel felt that Horton's expressed willingness to talk was evidence of his innocence.

Because there was no objection, the question of prosecutorial misconduct was not preserved for appeal. (People v. Baines (1981) 30 Cal.3d 143, 149.) And the record shows that counsel's omission resulted from a tactical choice which we cannot say was outside "the range of reasonable competence." (People v. Pope (1979) 23 Cal.3d 412, 426.) Therefore, the claim of ineffective assistance of counsel must also fail. (People v. Ledesma, supra, 43 Cal.3d at p. 216.)

References to Perjury

In his closing argument the prosecutor characterized defense testimony as a "parade of perjury", repeating this

phrase several times. And in his rebuttal remarks, after pointing out certain inconsistencies in the testimony of defense witnesses, he said this: "You don't like to think that people are actually going to lie to you, but it happens all the time in these walls in this building. If we prosecuted all the perjury that went on in criminal and civil trials --" Here he was interrupted by an objection. There followed a discussion at the bench, after which the court asked the prosecutor to rephrase his statement, explaining to the jury: "Lawyers are entitled to argue matters that are in evidence before the jury and matters that are common knowledge to the public at large and I suppose inferences that can be drawn by reason and logic from facts that are established in evidence." The prosecutor then resumed argument, explaining: "The problem I guess is the word "perjury". Maybe I better word it you have to decide who's telling you the truth or not . . . ."

Horton directs us to several cases which have found that a prosecutor commits misconduct when he refers to the defense witnesses as perjurers. (People v. Ellis (1966) 65 Cal.2d 529; People v. Reese (1963) 220 Cal.App.2d 143, 146; People v. Conover (1966) 243 Cal.App.2d 38.) The Reese case stated the reason behind this rule: "A witness on the stand cannot be impeached by an accusation of perjury unless the witness has been convicted thereof, since impeachment of this character stems from a prior conviction of a felony. An attorney should not be permitted to accomplish by argument that which he is precluded from doing by cross-examination." (People v. Reese, supra, at p. 147.)

The Reese court recognized, however, that not every instance where the word perjury is used will amount to misconduct. The district attorney prosecuting Reese, rather than pointing out discrepancies in the testimony of each witness and explaining to the jury how this indicated false testimony, which he had a perfect right to do, simply "branded defedant's witnesses as possible felons." (Id. at p. 147.) The critical distinction between permissible and impermissible argument is whether the prosecutor's comments are drawn from the evidence before the jury. (People v. Ellis, supra, 65 Cal.2d 529, 540.) "The words 'lie' and 'perjury' are the expressions commonly used to describe wilfully false testimony, and there is no reason why a prosecutor must resort to circumlocutions when discussing this distasteful but pertinent subject. . . . [¶] The test . . . is whether the argument was fairly based on the evidence." (People v. Garrison (1966) 246 Cal.App.2d 343, 352-354.)

In our case the prosecutor reviewed the testimony of the defense witnesses in considerable detail, pointing up discrepancies and inconsistencies, and asked the jury to apply common sense and logic to draw the conclusion that the alibi did not have "the ring of truth" about it. We do not believe that this argument could have raised in the jurors' minds the inference warned against in Reese that the witnesses were felons. In our view it makes no difference whether the prosecutor argued that the witnesses deliberately lied or suggested that they had perjured themselves; an attack upon the testimony of these witnesses is fair comment upon the evidence. (People v. Garrison, supra, at p. 355.)

Even had the prosecutor's reference to the "parade of perjury" amounted to improper argument, any possible prejudice arising therefrom was cured by the admonition of the judge and the retraction by the prosecutor.

THE WRIT PETITION

Horton claims that the various instances where counsel fell short of professional standards, including his failure to object to incidents of prosecutorial overreaching, together had a cumulative effect which deprived him of a fair trial. (People v. Hudson (1981) 126 Cal.App.3d 733, 741.) He argues that because the outcome of the case depended on the jury's determination of the relative credibility of the prosecution and defense witnesses, evidence which presented Horton and his family to the jury as people with criminal tendencies could have tipped the balance. Finally he points out that the prosecutor was engaged in a deliberate strategy to portray the Hortons as drug addicts. Because counsel failed to keep out the prejudicial evidence, he argues, he was denied the assistance of a reasonably competent attorney.

We have addressed each of Horton's claims and have found each to be either harmless error or not error at all. We do not find that their cumulative effect is such as to warrant reversal. The evidence was not closely balanced in this case. The victim, who was trained in voice identification and knew Horton personally, positively identified Horton's voice as that of the man who robbed him. Three weapons, two of them extremely

uncommon, fitting his description of those used in the robbery were found in Horton's home. Handcuff keys were also found. An eyewitness who saw Horton fleeing the scene with what appeared to be a gun under his arm identified him from a photo lineup shortly after the robbery. Moreover, Horton knew the victim was the treasurer of the coin club, knew the club was putting on a three day coin show, knew when the show ended, and could easily conclude that the victim would be returning home shortly thereafter with the receipts. In light of the overwhelming evidence of guilt, we find that appellant has failed to show that a determination more favorable to him would have resulted in the absence of the errors he claims. (Strickland v. Washington, supra, 446 U.S. at pp. 693-694.)

In his petition for a writ of habeas corpus, Horton has included two declarations by members of the defense bar who state their opinions that competent defense counsel would have acted to keep out evidence of Horton's prior conviction, all evidence on the tape recording, and all evidence regarding marijuana and methadone, and that they can conceive of no tactical reason for allowing this evidence before the jury. Also included is appellate counsel's declaration that trial counsel refused to talk to her about the case. Even if counsel's representation in certain instances fell below an objective standard of reasonableness under prevailing professional norms, no miscarriage of justice has been shown, as we have discussed above. The writ petition therefore does not add anything of susbstance.

IV. SENTENCING ERROR

Horton was sentenced to the upper term of six years for the robbery, and a consecutive term of eight months for possession of a concealable firearm by an ex-felon (Count III). His sentence was enhanced by two years under Penal Code section 12022.5, subdivision (a) for use of a firearm in the commission of a felony. He makes two claims regarding his sentence: 1) the judge used the same fact to impose the aggravated term and the enhancement; and 2) the judge failed to state his reasons for imposing the eight-month consecutive sentence for Count III. There was no dual use of a fact and the failure to state reasons was harmless error, not requiring remand.

Dual Use of a Fact.

Horton contends that the court considered the use of the the Uzi during the robbery as a factor both to impose the aggravated term and to enhance his sentence under Penal Code section 12022.5, subdivision (a). If so, the sentence violated California Rules of Court, rule 441(c). (People v. Arbee (1983) 143 Cal.App.3d 351, 356.)

The judge stated his reasons for imposing the sentence as follows: "I find this a particularly vicious crime, and I have no doubt in my mind that Mr. Horton is guilty of this and he involved others and that he found others establishing an alibi which I believe also was contrived. It's also established by

the type of weapon that's used and the severe force in using that stun gun repeatedly on his back, victim's back, which amounted to torture of the victim.

"All in all it is an aggravated case and I intend to impose the aggravated punishment, and he's got prior convictions, he's been to prison, to the case. I see nothing to mitigate the case at all. And the type of weapon that was involved possessed by an ex-convict is a status all by itself and doesn't come under section 654. So it's my intent to impose an eight year eight month term in this case."

The usual circumstances in aggravation and mitigation are set forth in California Rules of Court, rules 421 and 423. The judge articulated four factors in aggravation: 1) the crime involved a high degree of cruelty, viciousness or callousness (rule 421(a)(1)); 2) the defendant involved others in the crime (rule 421(a)(5)); 3) he suffered prior convictions of increasing seriousness (rule 421(b)(2)); and he had served a prior prison term (rule 421(b)(3)). He found no factors in mitigation.

Horton mistakenly understood the judge to refer to the Uzi as an aggravating factor. We agree with the Attorney General that the judge referred to the "type of weapon" twice to describe two different weapons. In the first case he was referring to the stun gun to explain his finding that the crime involved a high degree of cruelty. In the second instance, the reference was to the Uzi to explain that possession of that weapon is a crime in itself under Penal Code section 12021, subdivision (a) and thus did not fall within the proscription

against double punishment contained in Penal Code section 654.

There was no dual use of facts.

Failure to State Reasons

The Attorney General concedes that the judge did not state separate reasons for imposing a consecutive sentence for Count III (Pen. Code, § 1170, subd. (c)), but argues that the error was harmless because it is not reasonably probable that Horton would obtain a more favorable sentence on remand. (People v. Avalos (1984) 37 Cal.3d 216, 233.) We agree.

California Rules of Court, rule 425 provides that factors supporting imposition of consecutive sentences may include any circumstances in aggravation under rule 421. In this case there were four valid aggravating circumstances, any one of which is sufficient to authorize imposition of the upper term. (People v. Burney (1981) 115 Cal.App.3d 497, 505.) The remaining three aggravating factors cited by the court are available to support the imposition of a consecutive sentence.

The judge's comments made clear that he found Horton's crime to be a particularly vicious one, warranting aggravated punishment. In light of this, remand for resentencing would be an exercise in futility, since the trial court would simply restate the various factors and impose the same sentence.

DISPOSITION

The judgment is affirmed and the petition for writ of habeas corpus is denied.

OPPOSITION BRIEF

RESPONSE REQUESTED

ORIGINAL

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Supreme Court, U.S.
FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
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NO. 88-7164

IN THE

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v.

THE STATE OF CALIFORNIA,

Respondent.

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On Petition for Writ of Certiorari to the
Court of Appeal of the State of California,
Sixth Appellate District

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the California Court of Appeal, Sixth Appellate District, filed November 30, 1988, is not published. A copy is attached to the petition as Appendix A-1,. The order of the California Supreme Court denying review on March 15, 1989, is attached to the petition as Appendix A-2.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

United States Constitution, Amendment XIV, section 1:

"[N]or shall any State deprive any person, of life, liberty, or property, without due process of law. . . ."

QUESTION PRESENTED

Must evidence not "particularly described" in a search warrant, but found in plain view, be suppressed as not "inadvertently" discovered where the supporting affidavit establishes probable cause to seize such evidence.

STATEMENT OF THE CASE

On August 26, 1985, the District Attorney of Santa Clara County charged petitioner, Terry Brice Horton, with the violation of California Penal Code sections 211-213.5 (robbery inside a residence - count I); 236-237 (false imprisonment - count II); 12021(a) (possession of a concealable firearm - count III); and 12020(a) (possession of a short barrelled Uzi machine gun - count IV). (CT 207-208.)[1/]

The preliminary hearing magistrate suppressed an Uzi machine gun, a .38 caliber revolver, a pair of handcuffs, handcuff keys, and two stun guns found in petitioner's residence on the ground that these items were not listed in the search warrant. (CT 165.) On August 16, 1985, respondent moved for an order reversing the preliminary hearing magistrate's suppression order, pursuant to Penal Code section 1538.5(j). (CT 203.) After a hearing held on September 23, 1985, the superior court granted the People's motion and reversed the magistrate's decision. (CT 194, 273.)

Jury trial commenced on October 8, 1986. (CT 321.) On October 21, 1986, the jury found petitioner guilty of all charges and found the personal use of a firearm allegations to be true. (CT 428-429.) At trial, respondent caused to be admitted into evidence the items the magistrate suppressed as well as some ammunition, some batteries and a battery charger, an admission ticket or advertising brochure for a San Jose Coin Club show held January 11-13, 1985, and a token from the San Jose Coin Club. (RT 26-34, 252-257.) None of these items were listed in the search warrant. (CT 219-231, 254.)

On November 17, 1986, petitioner was sentenced to eight years and eight months in state prison. (CT 431.) Petitioner's conviction was affirmed by the California Court of Appeal on November 30, 1988. His petition for review in the California Supreme Court was denied March 15, 1989. The petition for certiorari was timely filed.

STATEMENT OF FACTS[2/]

"The Robbery

"Erwin Paul Wallaker (Wallaker) was the treasurer of the San Jose Coin Club. His duties included collecting the revenues generated by the club's annual coin show. In 1985 the show was held on January 11, 12 and 13 at the San Jose Convention Center. At the end of the third day, a Sunday, Wallaker left the convention center with approximately $10,000 in cash and currency in one briefcase, approximately $20,000 in collector coins of his own in another briefcase and approximately $1,200 on his person. He placed the briefcases in the trunk of his car.

"Wallaker proceeded directly home, arriving around 6:30 p.m. He backed his car into the driveway,

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1. Unless otherwise specified, all future code references are to the California Penal Code.

2. The facts are quoted from the opinion of the California Court of Appeal at pp. 2-9, except for the bracketed portion at page 6.

activated the garage door opener, and entered the garage on foot. Toward the rear of the garage he was surprised by two men wearing Halloween masks which covered their heads. One held a machine gun and the other a 'stunning' device. The first man demanded money while the second administered a series of shocks with the stun gun. Wallaker was eventually forced to the floor and handcuffed. He nonetheless attempted to keep the two men talking, because he had noticed that the first one had a strong southern accent which sounded familiar to him. This man was of medium height and build. Both men wore dark clothes.

"The second assailant removed three rings Wallaker was wearing and took his billfold and credit card case while the first held the machine gun on him at close range. Wallaker's feet were bound and he was hogtied, gagged and partially blindfolded.

"The man with the machine gun wanted to know where the rest of the money was. Wallaker pointed out a safe in the garage and one of the men removed the contents, consisting of several rings belonging to Wallaker's wife, some uncut rubies and a wristwatch. At some point the man with the stun gun produced a blue-steel short-barreled revolver. He rubbed it up against Wallaker's face, shone the flashlight on it and threatened to use it.

"The robbers demanded the car keys and eventually located them where Wallaker had tossed them. Wallaker heard the car door open and close, which prompted him to renew his efforts to make noise in the hopes of attracting help. This precipitated further threats from one of the assailants who returned to the garage, hit Wallaker over the head, and dragged him back further from the garage door. Wallaker heard the car door open and close again and then silence.

"He wriggled toward the front of the garage, yelling for help, and was able to attract the attention of three passersby. These three people came to his aid and called the police. The robbers had run off.

"The police arrived at approximately 7:00 p.m. Wallaker gave a statement and then was taken to emergency where he received several stitches on the back of his head.

"The three rescuers also gave statements. Lisa Miller, James Burwell and Jeff Beaulieu were walking along the street where Wallaker lived when a man rushed past them coming from the direction of Wallaker's house. The man was walking hurriedly, hunched over with his head down. He was of medium build and had longish gray-white hair. He was carrying something under his right arm which Miller thought was a gun and the others thought might be an umbrella.

"<u>The Search of Defendant's House</u>

"Sometime in the early hours of the morning after the robbery, Wallaker realized that he recognized the voice of the man with the southern accent as that of Terry Horton. Wallaker knew Horton as a fellow coin collector. He had seen Horton at various coin club meetings over the course of approximately five years and the two had spoken to each other on perhaps two dozen occasions. He had recently talked with Horton at a meeting approximately three weeks prior to the robbery. And he had noticed Horton in attendance at the coin show on the Sunday of the robbery.

"Wallaker contacted the police with this information the morning after the robbery. He met with Sergeant Gary Larault and made a positive ID of Horton from a mug shot. Larault then prepared a photo lineup and contacted Miller, Burwell and Beaulieu. Lisa Miller identified a picture of Horton as the man she

had seen that night. The other two were not able to make an identification.

"On January 28, 1985, a search warrant issued, authorizing the search of Horton's house for articles taken in the robbery. The eight-page police report of the crime was appended to the affidavit supporting the search warrant. [The police report and affidavit established probable cause for the seizure of all the items in issue. (CT 221-231.)[3] However, the warrant requested and the magistrate authorized only a search for the stolen rings. (CT 219-223.) At the superior court hearing on respondent's motion to reverse the magistrate's ruling, the prosecutor noted that "the deputy district attorney who drafted this particular search warrant did less than a superlative job in listing what was normally sought in our county...." (CT 272.) This was in response to petitioner's contention that the search was a pretext because the searching officer, who was also the search warrant affiant, testified that, in addition to the listed items, he was looking for the seized items not listed in the search warrant. (CT 269, 271-272; see CT 254-255.) When the prosecutor asked the officer if the warrant was obtained as a pretext to search for the unlisted items or if he had attempted to mislead the magistrate, petitioner's objection was sustained. (CT 255-256.)]

"The Horton house was searched January 30, 1985. An Uzi machine gun, with a long and a short barrel and loaded clips, and a loaded blue-steel .38 caliber revolver were found in the master bedroom. On a bookshelf in the dining room were two Nova XR 5000 stun guns in operating condition. A set of handcuff keys,

3. The affidavit and appended police report showed the crime was committed with a machine gun, a revolver, a stun gun, a pair of handcuffs, and that the robbers wore Halloween masks and certain clothing. These documents also established the relevance of the coin club evidence. (CT 221-231.)

an announcement advertising the San Jose Coin Club show, and some clothes were also removed. None of the items stolen from Wallaker's person or from his garage safe was recovered from the house; nor were any Halloween masks found.

"Horton surrendered himself on June 10, 1985, after a warrant issued for his arrest.

"Witnesses for the Prosecution

"Wallaker testified that the Uzi machine gun, the blue-steel .38 revolver and the Nova stun gun appeared to be the weapons used against him during the burglary.

"Wallaker was an ex-Air Force pilot. As a pilot he had been trained in voice identification. He had a practiced ear and was used to listening carefully to people's voices. He was 100 percent certain that the voice of the man who robbed him was Horton's.

"The stun gun had produced numerous red welts on Wallaker's back. James Scroggins, an expert on stun guns, testified that the only stun gun on the market in January of 1985 which would have caused the effects described by Wallaker was the Nova XR 5000.

"Wallaker testified that when he had seen Horton several weeks before the robbery, at a coin club meeting, Horton had shoulder length gray hair. He also thought Horton's hair was gray when he glimpsed Horton at the coin show on the day of the robbery. Officer Larault testified that when Horton surrendered himself on June 10, 1985, he took Horton's picture. That picture was admitted into evidence and showed Horton with shoulder length gray hair.

"Lisa Miller and James Burwell testified that the man they saw hurrying from the direction of Wallaker's house that evening of the robbery had collar or shoulder length gray hair, and a medium build. Miller testified that at the time she picked Horton's picture

from the photo lineup shortly after the robbery, she was "pretty certain" that was the man she had seen. At trial she was unable to say whether Horton was the man she has seen that night or not.

"The Defense

"Horton's defense was an alibi. He testified that at the time of the robbery he was at home watching TV and playing cards. His wife, his son, his daughter and two friends corroborated this testimony.

"Horton, his wife, and his daughter Cathy all gave substantially the same account of events on January 13, 1985. Around noon they went to the coin show, together with Cathy's boyfriend Jim Nash. They stayed until approximately 3:30 p.m. and then returned home. Jim and Cathy went out to get pizza and the four ate dinner together and then played cards. Two friends of the family, Vernon Burgess and Joe DeAngelo, dropped by and Horton's son Terry came home during a break from work. All of these witnesses remembered that "60 Minutes" came on the TV while they were at the Horton house because Horton and Jim Nash argued about whether to watch it or not. That show starts at 7:00 p.m.

"Terry Jr. was at work that night. He punched out at 6:46 p.m. and went home to feed his puppy. He arrived home shortly before 7:00 and found the others there playing cards with the TV on. Terry's friend Joe DeAngelo dropped by at about the same time. Vernon Burgess testified that he came by the Hortons' that night around 6:30 to borrow money to go to his father's funeral. Horton loaned him the money and he stayed the whole evening.

"The defense stressed that Horton's hair had not been long and gray at the time of the robbery. Various witnesses testified that Mrs. Horton had applied a rinse to Horton's hair in late December which had

turned his normally white hair to a blond-brown with red highlights. Burgess remembered this in particular because Mrs. Horton had done the same rinse on his hair at the same time and it was too red. San Jose coin dealer Sheldon Wirt testified that he talked with Horton briefly at the coin show on Sunday and that Horton's hair was a reddish-orange color on that day. Finally, Horton's brother John testified that Horton's hair was brownish-blond and somewhat short in January of 1985. He remembered because it was such a contrast from the previous month when his hair had been white on the occasion of his son's wedding. Horton testified that his hair had been silvery-white for his son's wedding in December of 1984. Shortly thereafter his wife had given his hair a red rinse. By June, when he surrendered himself to the police, the rinse had washed out and his hair color had returned to its natural gray-white.

"There was evidence that Horton was an avid gun collector and that various family members enjoyed target shooting at the rifle range. Cathy Horton testified that her dad had given her the .38 for her protection when she had lived away from home. The stun gun was also for her protection, since she came home late from a night class at San Jose State. Mrs. Horton owned several guns. She testified that Horton had given her the Uzi and that it was a collector's item. Horton's brother John testified that he and his brother had each bought stun guns for use by female family members.

"Horton took the stand and recounted the events of January 13, 1985, as we have summarized above. He denied any involvement in the crime. He stated that he had not seen Wallaker at any coin club meeting in December of 1984. He knew Wallaker and testified that

he had noticed him at the January coin show. He described two incidents involving Wallaker, both of which occurred in 1975 or 1976. Horton's 10-year-old daughter had bought some coins from Wallaker which Horton felt were overpriced and overgraded. He argued with Wallaker and threatened to inform the president of the club if Wallaker did not buy back the coins. Eventually Wallaker refunded his daughter's money. The second incident occurred at another coin show. Wallaker was talking to several people and Horton attempted to interrupt him to ask a question. Wallaker ignored him and Horton made a disparaging remark, at which Wallaker took offense. Horton surmised that Wallaker was implicating him in the robbery because of bad feelings stemming from these incidents.

"Defense introduced a brochure from the coin show, with the purpose of demonstrating that anyone attending the show could have 'cased' Wallaker for a later robbery. The brochure listed the officers of the sponsoring San Jose Coin Club, including Wallaker as treasurer, and also showed a layout of the floor, indicating where each dealer's table was. Wallaker's table was identified on this diagram."

ARGUMENT

UNDER THE CIRCUMSTANCES OF THIS CASE, THE SEIZURE OF ITEMS FOUND IN PLAIN VIEW DURING A SEARCH PURSUANT TO A VALID WARRANT WAS PROPER.

Petitioner contends that the items seized in plain view during the warrant search of his home must be suppressed because they were not named in the warrant and were not discovered inadvertently. He contends that *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) requires items found in plain view to have been discovered inadvertently. Accordingly, petitioner insists California's refusal to follow *Coolidge* (*North v. Superior Court*, 8 Cal.3d 301, 307-308 (1972)) is in "tension" with that decision and this Court should accept this case to "clarify whether the

states are bound to accept the inadvertence requirement of Coolidge." Pet. for Cert. at p. 5. We respond that as to "inadvertence," (1) the *Coolidge* plurality opinion is not binding precedent, (2) the *Coolidge* plurality opinion is neither clearly reasoned nor reasonably clear and, (3) if the *Coolidge* plurality opinion should be refined and made binding, this is an inappropriate case in which to do so.

In *Texas v. Brown*, 460 U.S. 730 (1983), a plurality of this Court stated:

> "In the Coolidge plurality's view, the 'plain view' doctrine permits the warrantless seizure by police of private possessions where three requirements are satisfied. [Footnote omitted.] First, the police officer must lawfully make an 'initial intrusion' or otherwise properly be in a position from which he can view a particular area. Id., at 465-468, 29 L Ed 2d 564, 91 S Ct 2022. Second, the officer must discover incriminating evidence 'inadvertently,' which is to say, he may not 'know in advance the location of [certain] evidence and intend to seize it,' relying on the plain-view doctrine only as a pretext. Id., at 470, 29 L Ed 2d 564, 91 S Ct 2022. Finally, it must be 'immediately apparent' to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. Id., 466, 29 L Ed 2d 564, 91 S Ct 2022. While the lower courts generally have applied the Coolidge plurality's discussion of 'plain view,' it has never been expressly adopted by a majority of this Court. On the contrary, the plurality's formulation was sharply criticized at the time, see, Coolidge v. New Hampshire, supra, 403 US, at 506, 29 L Ed 2d 564, 91 S Ct 2022 (Black, J., dissenting); id., at 516-521, 29 L Ed 2d 564, 91 S Ct 2022 (White, J., dissenting). While not a binding precedent, as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue." *Texas v. Brown*, supra, 460 U.S. at pp. 736-737; see also *Arizona v. Hicks*, 480 U.S. 321, 334 (1987) (dissenting opinion).)

Since *Coolidge* is not binding precedent, California's unwillingness to follow it creates no "tension" with the superior authority of this Court.[4] Even accepting *Coolidge's*

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4. In his treatise on the Fourth Amendment, La Fave notes only one state which has followed California's refusal to embrace *Coolidge's* inadvertence requirement. *State v. Romero*, 660 P.2d 715, 718 fn. 3 (Utah 1983); 2 La Fave, Search and Seizure, A Treatise on the Fourth Amendment, (2d ed. 1987), § 4.11(d), p. 350 fn. 69. He also notes that the lower courts "regularly characterize as 'inadvertent' the discovery of items as to which it appears the police could have made a probable cause showing in advance had it occurred to them to do so." 2 La Fave, *supra*, § 4.11(d), p. 355 (footnote omitted). We note that although the Circuits generally follow *Coolidge's* inadvertence requirement, they are also cognizant of its plurality status. See, e.g., *United States v. Bradshaw*, 490 F.2d 1097, 1101 fn. 3 (4th Cir. 1974); *United States v. Santana*, 485 F.2d 365, 369-370 fn. 8 (2 Cir. 1973).

inadvertence rule as a point of reference for further discussion, the facts of this case strongly militate against application of the rule. *Coolidge* itself several times implies that inadvertence is not required for plain view seizures of contraband, stolen property, weapons or objects dangerous in themselves. *Coolidge v. New Hampshire*, 403 U.S. at pp. 462, 471; id. at p. 519 (concurring and dissenting opinion); *United States v. Liberti*, 616 F.2d 34, 36-37 (2d Cir. 1980). The Uzi, the revolver, and the stun guns would thus be properly seized regardless of inadvertence.

The police removed from petitioner's residence weapons, handcuffs, and other objects of obvious evidentiary significance. The state courts approved the seizure of these items under the "plain view" exception to the Fourth Amendment's Warrant Clause. As the *Coolidge* plurality explained, the plain view doctrine avoids unnecessary inconvenience to law enforcement without subverting the two discrete purposes of the warrant requirement: first, to eliminate altogether searches conducted without probable cause by interposing a magistrate between the citizen and the police; second, to limit the scope of searches justified by probable cause, thereby preventing general, exploratory rummaging in personal effects. *Coolidge v. New Hampshire*, *supra*, 403 U.S. at pp. 467-468. Neither of the purposes served by the Warrant Clause is subverted by application of the plain view doctrine to petitioner's case. Of course, the same can be said of *Coolidge*.

The only inadvertence in this case is the deputy district attorney's oversight in failing to list on the search warrant some of the seized items for which the affidavit established probable cause. Here the police submitted their information to the scrutiny of the magistrate and obtained a valid warrant. The supporting affidavit furnishes probable cause to search for the unlisted seized items as a matter of law if the informational source is credited; the very issuance of the warrant necessarily implies that the magistrate did find that

source credible. Given the nature of the items listed in the warrant, the scope of the authorized search would not have been expanded by the addition of the unnamed seized items. Accordingly, the plain view doctrine did not implicate petitioner's right of privacy, but affected only his possessory interest. See *Coolidge v. New Hampshire*, *supra*, 403 U.S. at p. 515 (concurring and dissenting opinion). As the *Coolidge* plurality recognizes, of course, there is no constitutionally protected possessory interest in contraband stolen property or inherently dangerous objects. *Id.* at p. 471.

Given the *Coolidge* plurality's failure to define "inadvertence," its purpose in limiting the plain view doctrine is not easily discerned. Some have acknowledged this deficiency by equating "inadvertence" with police knowledge falling short of probable cause on the theory that without probable cause police cannot be expected to seek a warrant. E.g., 2 La Fave, *supra*, at pp. 351-352. A plurality of this Court suggested in *Texas v. Brown*, *supra*, 460 U.S. at p. 737, that the inadvertence requirement may guard against pretext searches. The inadvertence rule makes some sense in those situations where the officer knew in advance the location of certain evidence and intended to seize it, relying on the plain view doctrine as a pretext. But again, that plainly is not our case. To be sure, the officer knew (had probable cause) in advance of the location of the items and intended to seize them. His motives, however, were pure, not pretextual. The officer obtained an admittedly valid warrant; he presented probable cause to search for all the items he intended to seize to the magistrate, withholding nothing; only through the deputy district attorney's oversight were the seized items not listed in the warrant;[5/] and during the course of the search the

5. The prosecutor's representation on this point cannot seriously be doubted. Under these circumstances, there simply was no reason to omit the seized items from the warrant, for if the police bother to obtain a warrant, there is no reason not to list items they expect to find and seize. *Coolidge v. New Hampshire*, supra, 403 U.S. at p. 517 (concurring and dissenting opinion); 2 La Fave, supra, § 4.11(d), p. 354; The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 244 (1971). This is especially true where the police not only have sought a warrant, but have

officer came upon numerous other handguns and rifles that he did not seize as they did not match the victim's description (i.e., for which the officer did not have probable cause. (CT 257.))

In view of these circumstances, there is scant deterrent effect in suppression of the evidence. This Court has repeatedly emphasized the central purpose of the exclusionary rule as deterrence of police misconduct. *United States v. Leon*, 468 U.S. 897, 906, 908-909 (1984); *Stone v. Powell*, 428 U.S. 465, 486 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Peltier*, 422 U.S. 531, 536-539 (1975); *United States v. Calandra*, 414 U.S. 338, 347 (1974). The deterrent purpose of the exclusionary rule assumes the police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right. *Michigan v. Tucker*, 417 U.S. 433, 447 (1974). However, where law enforcement officers act in good faith or their transgressions are minor, the magnitude of the benefit conferred upon guilty defendants offends basic notions of the criminal justice system and may well breed disrespect for the law and administration of justice. *United States v. Leon*, supra 468 U.S. at p. 908. "Accordingly, '[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.'" *Id.* The nondeliberate (i.e., negligent) omission in this case, made without pretext (i.e., in good faith) amounts to a minor transgression. This negligent omission should not result in the exclusion of evidence. Cf. *Franks v. Delaware*, 438 U.S. 154, 171 (1978) (only showing deliberate falsehood or reckless disregard for truth will support a subfacial challenge to a search warrant).

Not only is the deterrent effect minimal here, the right protected is not as great as in the typical Fourth Amendment violation. As previously pointed out, petitioner's privacy was lawfully "violated" pursuant to the search for the

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presented facts supporting probable cause to seize the unlisted, as well as the listed, items.

listed items. Suppression of the unlisted items protects only petitioner's possessory interest. "While that interest is not undeserving of Fourth Amendment protection, it is hardly worth protecting at the costs inherent in the 'inadvertent discovery' limitation." 2 La Fave, *supra*, § 4.11(d), p. 353, [footnote omitted]. "[E]xclusion of lawfully discovered evidence should not result from a police failure to demonstrate to the magistrate the maximum intrusion upon the defendant's property which they were then constitutionally entitled to make." *Id.* at p. 354. "This seems a punitive and extravagant application of the exclusionary rule." *Coolidge v. New Hampshire*, *supra*, 403 U.S. at p. 517 (concurring and dissenting opinion). Even less reason for suppression exists where the demonstration for maximum intrusion is made to the magistrate but through oversight is not reflected in the warrant.

The plurality opinion in *Coolidge* has many other problems. Perhaps foremost among them is the failure to precisely define what is meant by inadvertent. The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 244 (1971); 2 La Fave, supra, §4.11(d), p. 351.

> "If the 'inadvertent discovery' limitation is to make any sense at all, however, it *must* at least mean that a discovery of objects not named in the search warrant is *always* inadvertent, without regard to the personal hopes or expectations of the executing officers, if there were not sufficient grounds to justify the issuance of a warrant which also named those objects as among the things to be seized. In light of the fact that Justice Stewart is not prepared to require the police to return to the magistrate for a second warrant when the discovery was 'inadvertent,' the only plausible explanation for requiring such action in the remaining cases (without regard to the risk that the evidence may be lost in the interim) is because the police could have (and thus, apparently, should have) included the discovered object in the first warrant." 2 La Fave, *supra*, § 4.11(d) at pp. 351-352. Emphasis in original; footnotes omitted.

To reiterate, the police did include probable cause for the discovered objects here. It is only the deputy district attorney's oversight in failing to list these items in the search warrant proper that is at issue here.

If probable cause is the touchstone of inadvertence, the *Coolidge* rule fosters the anomalous situation where the

police will be contending they lacked such cause and the defendant that such cause existed and should have been in the warrant. It has been observed that "[s]uch a scenario would hardly encourage police truthfulness." The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 245 (1971); 2 La Fave, supra, §4.11(d), p. 354.

Finally, this Court's subsequent decision in *Payton v. New York*, 445 U.S. 573 (1980), addresses any fear that may have motivated the *Coolidge* plurality that police would time warrantless arrests as a pretext to make plain view seizures within homes.

CONCLUSION

"[T]he inadvertence rule is unnecessary to further any Fourth Amendment ends and will accomplish nothing." *Coolidge v. New Hampshire, supra*, 403 U.S. at p. 517 (concurring and dissenting opinion). It is respectfully submitted that the petition for certiorari should be denied.

DATED: August 31, 1989

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CERTIFICATE OF SERVICE BY MAIL

TERRY BRICE HORTON,	)
	)
Petitioner,	)
	)
v.	)
	)
THE STATE OF CALIFORNIA,	)
	)
Respondent.	)
	)

MARTIN S. KAYE, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 350 McAllister Street, Room 6000, in the City and County of San Francisco, State of California; that on September 1, 1989, he served a true copy of the attached Response in Opposition to Petition for Writ of Certiorari in the above-entitled matter on counsel for petitioner by placing same in envelope addressed as follows:

Juliana Drous
214 Duboce Avenue
San Francisco, California 94103

Said envelope was then sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid.

Martin S. Kaye

MARTIN S. KAYE
Supervising Deputy Attorney General

JOINT

APPENDIX

Supreme Court, U.S.
FILED
NOV 13 1989
JOSEPH F. SPANIOL, JR.
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No. 88-7164

In The

Supreme Court of the United States

October Term, 1989

TERRY BRICE HORTON

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of California For The Sixth Appellate District

JOINT APPENDIX

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Petition For Certiorari Filed May 6, 1989
Certiorari Granted October 10, 1989

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JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

August 12, 1985 – Preliminary Examination heard in the California Municipal Court, Santa Clara County, Judicial District. Magistrate granted defendant's motion to suppress. Defendant held to answer on all charges.

August 23, 1985 – Information filed in California Superior Court, Santa Clara County.

September 23, 1985 – Hearing De Novo on Motion filed by District Attorney Regarding Validity of the Search and Seizure Ruling at the Preliminary Hearing, pursuant to California Penal Code section 1538.5(j). Superior court reversed magistrate's decision and ruled all evidence seized was admissible.

October 22, 1986 – Guilty verdict after jury trial.

November 30, 1988 – California Court of Appeal, Sixth Appellate District, affirms judgment.

IN THE MUNICIPAL COURT OF THE
SANTA CLARA COUNTY JUDICIAL DISTRICT,
SAN JOSE FACILITY, STATE OF CALIFORNIA

AFFIDAVIT FOR SEARCH WARRANT

The UNDERSIGNED, being first duly sworn, deposes and says: That on or about January 13, 1985, in the County of Santa Clara, State of California, the crime of ROBBERY (CALIFORNIA PENAL CODE SECTION 211) was committed by TERRY BRICE HORTON. That there is probable cause to believe that certain articles and property, consisting of: The items described and sketched on the attached "San Jose Police Department Property Report" are now concealed in and upon the premises and building known and designated as and commonly called 14292 Esther Drive, San Jose in said county and state described as: A one story residence with a green stucco exterior and detached garage including all rooms, storage areas, receptacles, trash containers, and buildings used in connection with said premises and building. That the following facts establish the existence of grounds for the issuance of a Search Warrant for the search of the premises above described:

Affiant has been a California peace officer for approximately 24 years. The past 20 years have been with the San Jose Police Department and the last 10 years assigned to the robbery investigation unit. Based on affiant's experience as a robbery investigator including consultations with other robbery investigators, affiant has concluded that robbers take the property stolen from

their victims to the robbers' place of residence. This conclusion is based on numerous cases investigated by affiant and affiant's fellow investigators in which property of robbery victims was lawfully seized in the robbers' houses.

Current records of the California Department of Motor Vehicles list the address of Terry Brice Horton as 14292 Esther Drive, San Jose, California. Affiant has looked at said address. It is a one story residence with green stucco exterior and detached garage.

The property described and sketched on the attached "San Jose Police Department Property Report" is some of the property taken from Erwin Paul Wallaker on January 13, 1985 in the manner and circumstances as set forth in the official San Jose Police Department Crime Report case No. 85-013-0931 and supplementary offense reports bearing the same case number, all of the above reports consisting of 8 pages attached hereto and incorporated herein by reference.

Victim Erwin Wallaker told affiant that he has personally heard Terry Brice Horton speak on several occasions and believes that based on those experiences he can recognize Horton's voice.

Larry Benson, secretary of the coin club of which victim Wallaker and suspect Horton are members, told affiant that club records list 14292 Esther Drive, San Jose, California as the mailing address of Terry Horton.

Based on all of the above affiant believes that the above described property probably is concealed somewhere upon the premises located at 14292 Esther Drive, San Jose, California.

Based on the above facts, your affiant prays that a Search Warrant be issued with respect to the above location for the seizure of said property and that the same be held under California Penal Code Section 1536, and disposed of according to law.

Subscribed and sworn to
before me this 28th day of
January, 1985

/s/ Sgt. Gary LaRault
GARY LARAULT

/S/ James H. Chang
JUDGE OF THE MUNICIPAL COURT

CRIME REPORT

SAN JOSE POLICE DEPARTMENT

14 ROUTING
CHIEF
ADMIN
BFO
B OF I
B OF A
AUTO DESK
BOMB SQUAD
INTELLIGENCE
INTERNAL INVEST.
CLETS
CRIME PREVENT.
PROPERTY CLERK
RESERVES
TECHNICIANS
TRAFFIC INVEST.
VICE
ABC
CII
FBI
DIST. ATTNY.
CITY ATTNY.
MENTAL HEALTH
CITY PERSONNEL
FIRE DEPT.
PRESS
OTHER

1. VICTIM LAST, FIRST MIDDLE (FIRM NAME, IF BUSINESS): WALLAKER ERWIN PAUL
2. CASE NO: 85-013-0931
15 TYPE OF CRIME: 211 PC. ARMED ROBBERY (RESIDENTIAL)
16 UCR CODE: 1A Rault
17 RECORDS #:
3. LOCATION OF OCCURRENCE: 6126 BOLLINGER RD. SAN JOSE
4. TYPE OF PREMISES OR NAME OF BUSINESS WHERE OFFENSE WAS COMMITTED: TWO STORY TOWNHOUSE IN RESIDENTIAL AREA
5. BEAT NO: 25
6. DATE AND TIME OCCURRED: 1/13/85 1850 DAY OF WEEK: SUN
7. DATE AND TIME REPORTED: 1/13/85 1900
18 REPORTING PERSON'S NAME - (LAST, FIRST, MIDDLE): MCKAY WILLIAM ERNEST
8. VICTIM'S OCCUP. - RACE - SEX - AGE DOB: RETIRED W-M 65 5/18/29
SOC. SEC. NO: 384-22-3184
19 REPORTING PERSON'S RESIDENCE ADDRESS: 6110 BOLLINGER RD. SJ.
20 RES. PHONE: 996-0707
10 VICTIM'S RESIDENCE ADDRESS / CITY: 6126 BOLLINGER RD. S JOSE
11 RES. PHONE: 257-3758
21 REPORTING PERSON'S BUSINESS ADDRESS: 340 PIONEER WY. MT. VIEW
22 BUS. PHONE: 965-3333
12 VICTIM'S BUSINESS ADDRESS (SCHOOL, IF JUVENILE):
13 BUS. PHONE:
23 INDICATE TIME AND LOCATION FOR WITNESS FOLLOW UP: M-F 0800 - 1600 @ BUSINESS
24 INDICATE TIME AND LOCATION FOR VICTIM FOLLOW UP: M-F 0800 - 1700 @ RESIDENCE

WITNESS

25 WITNESS NO. 1 - NAME (LAST, FIRST, MIDDLE) | SOC. SEC. NO. | RESIDENCE ADDRESS / CITY | RES. PHONE | BUS. PHONE
WITNESS NO. 2 - NAME (LAST, FIRST, MIDDLE) | SOC. SEC. NO. | RESIDENCE ADDRESS / CITY | RES PHONE | BUS. PHONE

VEHICLE

26 LICENSE NO. (STATE, YEAR) | ID NO. | YEAR | MAKE | MODEL | COLOR | (OTHER IDENTIFYING CHARACTERISTICS) | TOWED YES ☐ NO ☐
NONE SEEN OR HEARD
REGISTERED OWNER'S NAME | REGISTERED OWNER'S RESIDENCE ADDRESS | VEHICLE HELD YES ☐ NO ☐

SUSPECT NO. 1

27 SUSPECT NO. 1 - NAME (LAST, FIRST, MIDDLE): UNK
28 RACE: W | 29 SEX: M | 30 AGE: LATE 40'S | 31 DATE OF BIRTH: UNK | 32 HEIGHT: 5-9/5-11 | 33 WEIGHT: 165/185 | 34 HAIR: UNK | 35 EYES: UNK
ADDRESS - CLOTHING, AND OTHER IDENTIFYING MARKS OR CHARACTERISTICS: GRAYISH HALLOWEEN FULL HEAD MASK DARK JACKET DARK FABRIC GLOVES DARK PANTS BLACK SHOES (Poss Boots) Poss. Scarred Accent
PHONE: UNK
38 SOC. SEC. NO.: UNK
39 ADV OF RIGHTS YES ☐ NO ☒
36 ARRESTED YES ☐ NO ☒
40A PFN | 40B CEN NO. | 41 CITATION NO.

SUSPECT NO. 2

SUSPECT NO. 2 - NAME (LAST, FIRST, MIDDLE): UNK
RACE: W | SEX: M | AGE: LATE 20'S | DATE OF BIRTH: UNK | HEIGHT: 5-9/5-11 | WEIGHT: 165/185 | HAIR: UNK | EYES: UNK
ADDRESS - CLOTHING, AND OTHER IDENTIFYING MARKS OR CHARACTERISTICS: DARK JACKET DARK FABRIC GLOVES DARK PANTS DARK SHOES (Poss Boots) GRAYISH HALLOWEEN FULL HEAD MASK
PHONE: ---
SOC. SEC. NO.: UNK
ADV OF RIGHTS YES ☐ NO ☒
ARRESTED YES ☐ NO ☒
PFN | CEN NO. | CITATION NO.

SUSPECT NO. 3

SUSPECT NO. 3 - NAME (LAST, FIRST, MIDDLE)
RACE | SEX M F | AGE | DATE OF BIRTH | HEIGHT | WEIGHT | HAIR | EYES
ADDRESS - CLOTHING, AND OTHER IDENTIFYING MARKS OR CHARACTERISTICS | PHONE | SOC. SEC. NO. | ADV OF RIGHTS YES ☐ NO ☐ | ARRESTED YES ☐ NO ☐
PFN | CEN NO. | CITATION NO.

POINT WHERE ENTRANCE WAS MADE: ☐ FORCE ☒ NO FORCE
42 CRIMES AGAINST PROPERTY
EXACT LOCATION OF PROPERTY WHEN STOLEN: ON THE PERSON OF VICTIM
INSTRUMENT USED (DESCRIBE): HANDS
METHOD USED TO GAIN ENTRANCE: WALKED IN UNLOCKED REAR GARAGE DOOR
WHERE WAS OCCUPANT AT TIME OF OFFENSE: INSIDE GARAGE
TRADEMARK OF SUSPECT(S) - ACTIONS OR CONVERSATION: SUSPECTS WAIT FOR (V) TO COME HOME + ROB HIM @ Gun Point

WEAPON - FORCE OR MEANS USED: MACHINE GUN (Poss Toy) ELECTRICAL PROD, REMOVED 2" BLK PLASTIC STEEL
43 CRIMES AGAINST THE PERSON
EXACT LOCATION OF VICTIM AT TIME OF OFFENSE: GARAGE OF VICTIMS RESIDENCE
VICTIM'S ACTIVITY AT TIME OF OFFENSE: WALKING IN GARAGE
EXACT WORDS USED BY SUSPECT: "WE JUST WANT YOUR MONEY"
APPARENT MOTIVE - TYPE OF PROPERTY TAKEN OR OBTAINED: PERSONAL GAIN; $1,000.00 - 3 RINGS WALLET ID + CREDIT CARDS
ADVISED VICTIMS OF VIOLENT CRIMES PROGRAM: ☒ YES ☐ NO
44 DICTATED FOR TRANSCRIPTION: YES ☐ NO ☒
FOLLOW UP REQUIRED: YES ☒ NO ☐

PREMISES 45
PREMISES TYPE: (RESIDENCE) APT. DUPLEX HOTEL/MOTEL SCHOOL CHURCH BAR/REST. MEDICAL OFF. BLDG. MFG. CO. GAS STATION DEPT. STORE SMALL BUS.
POINT OF ENTRY: DOOR WINDOW (GARAGE DOOR) ADJACENT PREM. OTHER
LOCATION: FRONT (REAR) SIDE ROOF OTHER
METHOD OF ENTRY: OPEN (UNLOCKED) BODY FORCE PRY/CUTTING TOOL CHANNEL LOCKS BREAK GLASS OTHER

OFFICER ACTIVITY 46
LOCAL APB / STATE WIDE / NCIC / TELETYPE
DET NOTIFIED / DET ON SCENE / NO FOLLOWUP REQUIRED
INDICATE - YARD SEARCH / FIELD SEARCH / AREA SEARCH / CURSORY/INTENSIVE
FILE CHECK
VICTIM 1/2 ____ # ____ SUS #1 ____ # ____
WITNESS 1 ____ # ____ SUS #2 ____ # ____
WITNESS 2 ____ # ____ SUS # ____ # ____
REP PRTY. ____ # ____ SUS # ____ # ____

47 INVESTIGATING OFFICER | 48 SERIAL NO. | 49 ADDITIONAL REPORTS FILED

CRIME REPORT

SAN JOSE POLICE DEPARTMENT

211 PC ARMED ROBBERY (RESIDENTIAL)

1. VICTIM LAST, FIRST MIDDLE (FIRM NAME, IF BUSINESS): WALLACE, BRUCE PAUL
2. CASE NO: 85-013
3. LOCATION OF OCCURRENCE: 6126 BOLLINGER RD SAN JOSE
4. TYPE OF PREMISES OR NAME OF BUSINESS WHERE OFFENSE WAS COMMITTED: TWO STORY TOWNHOUSE IN RESIDENTIAL AREA
5. BEAT NO.: 05
6. DATE AND TIME OCCURRED: 1/13/85 1250 DAY OF WEEK: SUN
7. DATE AND TIME REPORTED: 1/13/85 1300

TYPE OF CRIME:

PROPERTY TAKEN

49 ITEMIZE PROPERTY TAKEN, SHOWING SERIAL NUMBER, BRAND, MODEL. 50 SERIAL NO.

(1) BLK CHECKBOOK HOLDER CONTAINING APPROX $600.00 IN U.S. CURRENCY 1's-5's, 10's, 20's

(2) LT. BRN CHECKBOOK HOLDER CONTAINING $400.00 2-100's, 4-50's.

(3) BRN WALLET 5"X4" W/V's I.D. & CREDIT CARDS

(4) KEY RING W/V's DOG TAGS, CADILLAC & HOUSE KEYS

(5) 3 MEN'S GOLD RINGS - 2 W/DIAMONDS 1 W/GOLD COIN.

EVIDENCE

50 EVIDENCE WHERE FOUND, BY WHOM AND DISPOSITION.

ADDITIONAL EVIDENCE ☐ — TECHNICIAN AT SCENE? ☐ YES ☒ NO

POSS FINGERPRINTS / FOOTPRINTS / BLOOD / TOOL MARKS / EVIDENCE PRESERVED / PHOTOS 7 INSIDE / LOOKED AT NO OUTSIDE

(1) PAIR OF BLK HANDCUFFS.
(2) RAG (TORN WHT SHEET.
(3) SPOOL OF MEDICAL TAPE
(4) APPROX 1/4" DIAMETER PARACHUTE ROPE.
(5) USED BLOODY 1" MEDICAL TAPE

REFER TO F-13

TOTAL PROPERTY VALUE LOSS $ 600.00

WEAPON

51

REVOLVER / AUTOMATIC — BARREL: 2 INCH, 4 INCH, 6 IN OR MORE

BLUE STEEL, NICKEL PLATE, GRIPS: PLASTIC, DRK/LGT, BROKEN, UNUSUAL
RIFLE, SHOTGUN, SAWED OFF, TOY GUN, SIMULATED, OTHER GUN, DERRINGER
KNIFE, SWITCH BLADE, BLADE OVER 6 IN, BLACKJACK, CLUB/BAT, RAZOR, MISSILE/ROCK
BOTTLE/BROKEN GLASS, AXE/CLEAVER, ICE PICK/SCISSORS, BB/PELLET/AIR RIFLE, HANDS/FEET, OTHER
STOLEN WEAPON FROM _____ OTHER CASE NO. _____ SERIAL NO.

BICYCLE REPORT

52 LICENSE NO. FRAME NO. LIC. COLOR OR WHAT CITY? LIC. EXP. DATE
DATE STOLEN TIME TO BRAND
WHERE PURCHASED DATE
TYPE: BOYS - GIRLS - STD. - STINGRAY - RACER
SIZE: 12 - 16 - 20 - 24 - 26 - 27 - 28
SPEED: 1 2 3 5 8 10 15
BASIC COLOR TIRES BW MW TIRES W.P. - BALLOON
SEAT COLOR VALUE: REG - POLO - RACER
FENDERS COLOR HANDLEBARS: FRONT - REAR REG - STRPLY - RACING
DISPOSITION RELEASE TO FINDER

ALCOHOL / NARCOTICS

53 RECOMMENDED SPECIMEN - OPIATES & AMPHETAMINES = URINE; PCP = BLOOD & URINE; BARBITURATES & OTHER = BLOOD

			SAMPLE TAKEN		
SUS APPEAR UNDER INFLUENCE?	S#1 YES NO	WHAT SUBSTANCE?	BLOOD URINE	ON METHADONE?	YES NO
	S#2 YES NO	WHAT SUBSTANCE?	BLOOD URINE	ON METHADONE?	YES NO
	S#3 YES NO	WHAT SUBSTANCE?	BLOOD URINE	ON METHADONE?	YES NO
	S#4 YES NO	WHAT SUBSTANCE?	BLOOD URINE	ON METHADONE?	YES NO

NARCOTIC CONTRABAND BOOKED? YES NO — OTHER PROPERTY BOOKED? YES NO

ADMONISHMENT

1. "You have the right to remain silent and to consult with an attorney prior to any questioning about the charges. You DO NOT have a constitutional right to refuse to submit to physical evidence. Blood and urine specimens are physical evidence when an influence violation is suspected."
2. "Do you understand what I just explained to you?" Quote: _____
3. "You are being charged with _____ and I want you to give a _____ specimen for the purposes of analysis."
4. Defendant's response: _____
5. If refused, repeat #1 above and add the following:
6. "If you refuse or fail to give the specimen for the purposes of analysis as requested, the fact that you refused can and will be brought out in court against you. If you are in fact innocent the specimen will aid in your defense. The specimen, on the other hand, may aid in your prosecution."
7. "Do you fully understand that your refusal can and will be held against you during the trial on this charge?" Quote: _____
8. "With an understanding of what has just been explained, do you still refuse to give a _____ specimen?" Quote: _____

MISSING PERSONS

54 UNUSUAL DENTAL WORK _____ UNDER MEDICATION _____
WEARS GLASSES (TYPE) _____
MARKS, SCARS, AMPUTATIONS _____ UNUSUAL JEWELRY WORN _____
EXTRA CLOTHING TAKEN _____
UNUSUAL IDENTIFIERS (HAIR STYLE, MUSTACHE, BEARD ETC.) _____
IF VEHICLE TAKEN COMPLETE FORM 4-17 YES NO

55

INDICATE WHERE SUS/VICT PROPERTY LOCATED IN VEHICLE

HOLD ON VEHICLE? (NOTE ON FORM 4-17) YES NO
FOR

56 DETAILS: ADDRESS THE CATEGORIES LISTED BELOW, (WHERE APPLICABLE) IN THE ORDER THEY APPEAR

(1) LIST ADDITIONAL VICTIMS.
(2) LIST ADDITIONAL WITNESSES.
(3) LIST ADDITIONAL SUSPECTS/ARRESTEES AND CITATION #'S IF APPLICABLE
(4) IF VICTIM INJURED, DESCRIBE INJURIES & WHERE MEDICAL EXAM PERFORMED
(5) INDICATE TIME & LOCATION WHERE VICTIMS & WITNESS MAY BE CONTACTED LATER FOR FOLLOW UP. (NOT COVERED IN ITEM 23-24 ABOVE.)
(6) INDICATE IF VICTIM, REPORTING PARTY, WITNESS OR SUSPECT GAVE STATEMENT. RECORD STATEMENT ON FORM 200-3.
(7) ITEMIZE ADDITIONAL PROPERTY TAKEN, SHOWING SERIAL NO., BRAND, MODEL, CALIBER OF WEAPONS, IDENTIFYING MARKS AND VALUE OF EACH ITEM
(8) LIST ADDITIONAL PHYSICAL EVIDENCE, WHERE FOUND, BY WHOM AND DISPOSITION, IDENTIFYING MARKS.
(9) RECONSTRUCT THE INCIDENT - - INCLUDE ALL NECESSARY ELEMENTS OF THE CRIME.

ITEM NO.

DETAILS: VICTIM ADVISED THAT HE LEFT A COIN DEALER CONVENTION IN DOWN-TOWN SAN JOSE AT APPROX. 1830 HRS AND ARRIVED AT HIS RESIDENCE @ APPROX. 1850 HRS HE PARKED IN HIS DRIVEWAY AND OPENED THE GARAGE DOOR W/ AN AUTOMATIC GARAGE DOOR OPENER. HE WALKED IN THE GARAGE AND FOUND S#1 STANDING IN THE REAR OF THE GARAGE HOLDING A BLK MACHINE GUN WITH A ROUND MAGAZINE

CCDOG

Details Cont: Victim asked suspect, "Who are you?" Suspect #1 answered, "We just want your money." Victim asked "Why me?" Suspect answered "Because we know your rich gringo."

The garage door light went out and Suspect #2 approached victim from behind and shocked him with some type of electrical shocker. S#2 then shocked victim again and said "Give me your hands" victim complied and Suspect #2 handcuffed victims hands behind his back. S#1 then tied victims feet with the rope and while doing so dropped the machine gun. Victim advised that when the gun hit the ground it sounded like plastic.

S#2 wrapped medical tape around victims eyes but didn't cover his eyes completely. S #1 tied a rag around victims head and in his mouth as a gag. He also put tape over victim's mouth.

S#2 took victims wallet out of his back pocket and using a flashlight found it did not contain any money. S#2 asked "where's the money," and victim did not answer. S#1 checked victims front pockets and found the two checkbook holders containing the money. One of the suspects then took the victims rings off his fingers. S#1 wanted to know how to get in V's safe which was in the garage. Victim told him it was unlocked.

S#1 looked inside and pulled out approx 20 expired credit cards. Victim told suspect the cards were all expired. S#1 then took victims car keys and threw the cards on the ground. He went out to victims car and started to get in. Victim started yelling and suspect #2 yelled; "shut up or we'll kill you." Victim continued yelling and suspect #2 came in and hit victim over the

head w/a flashlight. Victim quit yelling and suspect #2 yelled to suspect #1 "lets get the 'fuck' out of here. Suspect #2 went w/b out of the garage towards HYDE and then suspect #1 got out of victims car and fled w/b on Bollinger. Victim began yelling for help at some pedestrians who came in and untied him. (Refer to F-2a by ofc. Dini #2274 with witness' statements.

Details Cont: Page 4 Witness Miller ran to RP's residence and asked him to notify police. R.P. placed the call and then went to victims residence where he cut the handcuff chain as victims wrists were in pain.

I arrived and put out the bol for suspects as was given to me by victim. I released him from the handcuffs and took his statement. Victim had a laceration to his scalp in the back of his head which took 6 stitches.

He advised he did not think he knew suspects and did not see their faces. Victim also did not know if they took and coins out of his safe but will take inventory tomorrow. Victim will make a complete list of property taken on form 3b and bring it in ASAP.

For witness statements refer to F-2a By OFC. Dini. for evidence booked at central supply refer to F-13. OFC Demers #2310 took 7 photo's of the scene with negative results. Victim did advise that both suspects wore gloves thru-out the entire incident.

* Victim has been at the coin show for two days and suspects may have cased him the previous day although there is nothing to corroborate this.

* Victim advised that suspect #2 showed him the butt of what appeared to be a blue steel 2" B&L revolver although he did not see the gun.

I. *Listed Info:* Witness information

Witness #1: Miller, Lisa Lynn, SSN 550-47-1018, 10784 Johnson Ave, cupt, 95014, (H) 257-3077, (w) 371-0992, M-F 8am-5pm @ work.

Witness #2: Beaulieu Jeff, SSN 552-31-0630, 6362 Canterbury ct, sj, (H) 996-0630, (w) 415 321-2940, M-F after 6 pm at home.

Witness #3: Burwell, Von, SSN 568-55-0710, 6362 Canterbury ct. sj, (H) 996-0630, (w) 379-2020, w-Sat, 3-11 pm at home.

III. *Statements*

Witness #1 Miller told me she & two friends (witnesses 2 & 3) were walking e/b on the south sidewalk of Bollinger Road. She saw a WMA, walk toward her at a fast pace. It appearred (sic) he was carrying an umbrella in his right hand. He walked past her & walked south on HYDE St. Miller walked approx 25 yards then heard someone calling for help. Her & her friends checked the garage of 6126 Bollinger & found the victim tied up. She described the man that walked past her as being a WMA, in his late 40's, 5-8/5-9, 170 lbs, white or gray hair, with black rim, glasses. He was clean shaven wearing a light colored pull-over jacket with a hood. She & friends untied the vict & she called police.

Statements (Cont.)

Witness #2 Beaulieu: Told me he was walking (illegible)/b on Bollinger RD with his Friends. He saw a WMA walking very quickly towards him from the lawn area of 6126 Bollinger RD. The WMA passed him & either turned south on HYDE St, or continued east on Bollinger. When Beaulieu & his friends reached the driveway of 6126 Bollinger, he heard a male voice calling for help from the garage. The garage door was open, but the light was out, so Beaulieu used his cigarette lighter to iluminate (sic) the garage. He saw the vict laying on the floor tied up. He assisted the vict, while his friend called police. Beaulieu said the susp was carrying something in his right hand when he passed them. It was something with a 2-3 inch metal tip on the end of it, possibly an umbrella.

Witness #3 Burwell: Burwell's statement concurred with witness #1's (Miller) statement. Burwell told me the susp, after passing them, walked s/b on Hyde St.

Action taken

I obtained statements from witnesses & dusted 1" diameter metal tape roll for possible prints with negative results.

SUPPLEMENTARY OFFENSE REPORT
San Jose Police Department

OFFENSE
Robbery, Burglary, ADW

VICTIM NAME
Erwin Paul Wallaker

RESIDENCE ADDRESS
6126 Bollinger Rd

DATE AND TIME REPORTED TO DEPT.
1-13-85 1850hr

CASE NO.
85-013-0931

New information must be submitted in the following order: (1) Case status change (2) Offense Reclassification (3) Additional victim(s) (4) Additional witness(es) (5) Additional suspect(s) (6) Additional suspect vehicle(s). Start narrative only after applicable entries (1) through (6) have been completed. NOTE: ITEMS (1) & (2) APPLY TO INVESTIGATORS ONLY.

1-14-85

V WALLAKER talked to u/s about his robbery. He now thinks that suspect#1 might be a TERRY HORTON, who happens to be a member of the same coin club towit the V is a member.

U/s obtained a booking photo of a TERRY BRICE HORTON dob 08-16-32, who resides at 14292 Esther Drive, San Jose, and put the photo into a photo line-up (Photo line-up #1, Case # 85-013-0931). U/S showed the V the line-up and he pointed to photo #6 as being the TERRY HORTON he was referring too. Photo #6 is the booking photo of HORTON.

V WALLAKER said that during the robbery he felt that he recognized the voice of suspect #1 as that of HORTON's. Additionally V WALLAKER said that the physical features of suspect #1 were similar to HORTON's.

1-15-85

U/S showed W LISA MILLER, photo line-up #1, case # 85-013-0931. This line-up consisted of six (6) black and white photographs of W, M, A's all having similarities in appearance. Position #6 is a 1982 booking photo of TERRY BRICE HORTON.

She looked at all the photos and initially thought the man she saw leaving the victim's residence was similar to photo's #1 and #6. Then she ruled out photo #1 and felt photo #6 was possible the suspect, based on his facial features. She was having difficulty at first, becasue (sic) the man she saw leaving the residence was wearing glasses. She recalls the suspect wearing polyester pants, and a light colored zippered style jacket. He was carrying a object in his right hand that seemed to refect light.

U/S showed the same line-up to witness VON BURWELL and he thought photo #1 was possible the person he saw leaving the residence.

1-17-85

U/S showed the same line-up to witness JEFF BEAULIEW and he did not see anyone that looked like the person leaving the house.

DATE 1-18-85

OFFICER Sgt. Gary L. LaRault

BADGE NO. 1261

1-17-85

U/S showed W. JEFF BEAULIEW folder #1, case # 85-013-0931. After looking at all the photos he thought photo #1 had similar style of hair, in that the W remembered the person he saw leaving the V's home had white or gray hair. He pointed to photo #5 as looking similar in body size. He did not recognize any similar facial features in any of the photos in the folder.

Sgt. Gary L LaRault

BADGE NO. 1261

IN THE MUNICIPAL COURT OF THE
SANTA CLARA COUNTY JUDICIAL DISTRICT,
SAN JOSE FACILITY, STATE OF CALIFORNIA

SEARCH WARRANT

THE PEOPLE OF THE STATE OF CALIFORNIA
TO ANY PEACE OFFICER IN THE COUNTY OF SANTA CLARA, STATE OF CALIFORNIA:

Proof by affidavit having been this day made before my by SERGEANT Gary LaRault and it appearing therefrom that there is probable cause to believe that certain articles and property, consisting of: The items described and sketched in the attached "San Jose Police Department

Property Report" are now concealed in and upon the premises and building known and designated as and commonly called 14292 Esther Drive, San Jose in said county and state described as a one story residence with a green stucco exterior and detached garage including all rooms, storage areas, receptacles, trash containers, and buildings used in connection with said premises and building, and it further appearing that said articles and property constitute grounds for the issuance of a search warrant pursuant to Penal Code Section 1524.

YOU ARE THEREFORE COMMANDED in the daytime to search the premises described above for said articles and property, and if you find the same or any part thereof to retain the same in your custody pending disposition according to law. Return of this Search Warrant shall be to the above-entitled Court. GIVEN UNDER MY HAND and dated this 28th day of January, 1985.

/s/ James H. Chang
JUDGE OF THE MUNICIPAL COURT OF THE SANTA CLARA COUNTY JUDICIAL DISTRICT, SAN JOSE FACILITY, STATE OF CALIFORNIA

VICTIM WALLACKER, ERWIN PAUL

Case Number 85-013-0931

Address 6126 BOLLINGER RD. SAN JOSE

Phone: Home 257-3258 Bus. —

SAN JOSE POLICE DEPARTMENT

PROPERTY REPORT

INSURANCE NO.

Address

Phone Numb

00015

PLEASE TYPE OR PRINT - RETURN WITHIN 10 DAYS

ITEM DESCRIPTION	BRAND	MODEL #	SIZE	COLOR	SERIAL NUMBER	IDENTIFYING MAI S	SKETCH	Value
Gr. Ring w/ 2½ Dollar	LIBERTY	Gold Piece	Mounted		14K Gold			500
MANS Wedding Band	Gold 14K	W/24K Inlay	W/ 3/4		KARAT DIAMOND		SIDE VIEW	500
MANS CUSTOM MADE	Gold Ring 14K w/	3/4K. DIAMOND	10pt DIAMOND &		2 X ½ K RUBIES		TOP VIEW	2,000
							SIDE VIEW	
(TAKEN FROM WALLET)								
PACKAGE CONTAINING	8-9 ½ KARAT		UN MOUNTED		RUBIES			500
PACKAGE CONTAINING	PEAR SHAPED		AMATHYST		APPROX 25 KARATS			1,000
MANS WRIST	METAL	WRISTWATCH	(E. BOREL)		SWISS			100
LADIES DINNER	RING 14K Gold		CONTAINING APPROX.		25-30 SMALL SAPPHIRES		TOP	1500

NOTE: PLEASE READ INSTRUCTIONS ON THE REVERSE SIDE BEFORE COMPLETING THE REPORT.

In the Municipal Court of the State of California, Santa Clara County Judicial District

(caption omitted in printing)

* * *

[145] Q (By Mr. Martin) Sgt. Larault, as a detective are you attached to the robbery unit in the San Jose Police Department?

A Yes, I was.

Q Did you have occasion to investigate this particular residential robbery?

A Yes, sir, I did.

Q And on January 14, did you go out and talk to Mr. Wallaker?

A Yes, sir, I did.

A Okay. And as a part of that discussion, did you prepare a police report, supplemental police report?

A Yes, I did.

Q Did Mr. Wallaker tell you on that occasion what he has told us here in court today about recognizing the voice of one of the robbers?

A Yes, it is somewhat out of context. If I could explain that.

THE COURT: Do you want the answer read back?

MR. MANSFIELD: No, Your Honor. No, Your Honor.

Q (By Mr. Martin) Yes, if you could explain and perhaps you [146] could explain also your written supplemental

police report as to whether you're quoting him exactly or not, that would be helpful?

A Yes, I had telephoned Mr. Wallaker but at that point in time on the phone at the office he gave me the name of Terry Horton and I went to his home with a photograph of Mr. Horton.

Q And did Mr. Wallaker identify Mr. Horton –

A Yes.

Q – from the photograph?

A Yes.

Q Now, did you write the supplemental police report detailing what Mr. Wallaker said to you about the recognition of the voice of one of the suspects?

A No, not so much the voice on the initial conversation with Mr. Wallaker on the telephone he gave me the name of Terry Horton. I came to him and he was fairly sure. When I went out to his house to show him the photograph, I said, "Well, how sure are you?"

He said, "Well, I'm very positive." And he left me with the impression when I left the home that he was very positive in his – short of seeing his face, everything else was directed to Terry Horton.

* * *

[147] Q (By Mr. Martin) Do you have prior statements of Mr. Wallaker regarding the recognition of Mr. Horton as one of the suspects detailed in the report?

A Yes, I do.

Q Okay. Was that supplemental report incorporated by reference into the affidavit for the search warrant that was obtained later on?

A Yes, I believe it was.

MR. MANSFIELD: Well, I'll ask that that be [148] stricken. Certainly the search warrant speaks for itself.

THE COURT: All right. The objection will be sustained on the grounds stated.

MR. MANSFIELD: Your Honor, may I have a moment with Mr. Martin?

THE COURT: Yes.

MR. MANSFIELD: I withdraw my objection, Your

* * *

Q (By Mr. Martin) Sergeant Larault, just so the record is clear and I'm probably going about this in the wrong way, but can you just tell me what the first eight pages of the police report are and who authorized them and give us a rough description of each page as they were incorporated in the affidavit for the search warrant in this case so that the record is clear. Starting with Page 1, what's that?

[149] A The first four pages are handwritten words written by Officer Winslow, Badge 2011. They consist of the primary San Jose crime report.

* * *

[151] Q Based on obtaining that search warrant, did you go out to Mr. Horton's house –

A Yes, I did.

Q – at some time?

And what date was that, for the record?

A January the 30th, 1985.

Q And did you recover certain property based on that search warrant and affidavit at Mr. Horton's house?

A Yes, I did.

Q Referring to People's Exhibit 1, the Uzi machine gun, was that recovered out there?

A Yes, sir.

Q And where was that located in the house when you found it?

A The northwest bedroom in the home, up against the south wall of that bedroom inside of a camouflaged rifle carrying [152] case.

Q And would you describe that bedroom, the northwest bedroom as being the master bedroom or one of the smaller bedrooms?

A The master bedroom.

Q Referring to People's Exhibit 2, the handgun, the revolver, did you recover that in part of the search warrant?

A Yes, I did.

Q And where was that located in the residence?

A On a shelf located up against the north wall of a dining room.

Q Referring to People's Exhibit 6 and 7, the two Tasers, also called Nova XR5000 Stun Guns, did you recover them in part of the search warrant?

A Yes, on the same wall.

Q In the dining room?

A On the same set of shelves against the same wall in the dining room.

Q Both Tasers were located in the same location?

A Yes.

Q Referring to People's Exhibit 3, the keys –

A I made a mistake, if I could correct it?

Q Sure.

A The handgun itself was found in the bedroom, the same bedroom as that of the rifle or the automatic.

Q The Uzi?

A Semi-automatic weapon, yes.

Q In other words People's Exhibit 1 and 2 were found in the [153] same bedroom?

A Yes, they were.

Q Were they together?

A No, no. They were not. They were – the Uzi was in the case on the floor and the handgun was next to a purple Seagrams bottle bag on the south wall.

Q Both in the master bedroom?

A Both in the master bedroom.

Q Referring to Exhibit 3 which is the set of keys, do you see a handcuff key as part of that exhibit, first of all?

A Yes, I do.

Q And did you recover the set of keys including the handcuff key pursuant to the search warrant?

A. Yes, I did.

Q Where did you get that?

A That was in the dining room on the bookshelf on the north wall.

Q Was it anywhere near the two Tasers?

A Different rooms – Oh, my error. Yes, they were on the same shelf.

Q We had some handcuffs here in court that had been separated, black in color. People's Exhibit 8, were they recovered as part of the search warrant or were they obtained else where?

A Obtained else where.

Q And did you personally obtain these or did you retrieve them from the police property room?

A From the police property room.

[154] Q There are two jackets here in court, Exhibit 4 which has been identified as Mr. Horton, the defendant's jacket. Did you recover that as part of the search warrant?

A Yes, I did.

Q Where did you recover it?

A Sitting on the back of a chair in the dining room.

MR. MANSFIELD: What number is that?

MR. MARTIN: That's No. 4.

Q (By Mr. Martin) And People's Exhibit 5, another tan jacket identified by a witness as Cathy Horton's. Did you obtain that as part of the search warrant?

A Yes, I did.

Q Where did you find that?

A The closet in the master bedroom which is up against the south wall.

Q The master bedroom?

A The master bedroom.

Q Sgt. Larault, you had an affidavit which is three pages long. Did you have the search warrant with you at the time you went out to the house?

A Yes, I did.

Q What in particular were you looking for when you executed the search warrant other than the property, excluding for the purpose of the question, other than the property that had been taken from the victim?

A I was looking for some type of a mask that covers one's head; I was looking for gloves; I was looking for a weapon, both the weapon described to me by the victim in my interview and [155] also the one held by one suspect as he described by Mr. Horton and the other

weapon being the small handgun being held by the second suspect. I was looking for some kind of device that would produce a shock or burning sensation; I was looking for handcuffs or similar handcuffs that indicate more handcuffs could be found or keys for the handcuffs to unlock same; I was looking for some evidence of the San Jose Coin Show and to find out if in fact Mr. Horton was at the coin show.

* * *

Q (By Mr. Martin) Did you find as part of the execution of the search warrant, evidence that Mr. Horton had been to the coin club show?

A Yes, I did.

Q What did you find?

A Let me correct that answer. I found evidence that somebody in that household had some brochure or had literature advertising the coin show that weekend.

Q Did you find a ticket stub to the coin show?

A It was – there was a ticket stub or it was more like a ticket advertising the show.

Q Do you recall whether or not you found some sort of document or part of a document that pertained to the coin club [156] show on January the 13th, 1985?

A Say that again, please?

Q Do you recall as part of the execution of the search warrant on the 30th of January some sort of document, either a ticket or ticket stub or a brochure or part of a brochure that indicated that somebody had been at the coin club show on Sunday, January 13, 1985?

A Yes.

Q What was that that you found?

A It was like an admission ticket to the San Jose Coin Club which was held at the, I believe McCabe Hall in San Jose for the weekend of January the 11, 12 and 13 of 1985 and I found that on a dresser in the master bedroom.

* * *

[157] Q (By Mr. Martin) Sgt. Larault, showing you People's Exhibit 13, do you recognize that?

A Yes, I do.

Q Did you find that out at Mr. Horton's house as part of [158] the execution of the search warrant also?

A Yes, I did.

Q Whereabouts in that, and that is some sort of a –

* * *

MR. MARTIN: But it's some sort of document associated with the coin club for purposes of identification, is that acceptable?

Q (By Mr. Martin) Did you find that Exhibit 13 out there at the house?

A Yes, I did.

Q And whereabouts in the house did you find it?

A In the master bedroom.

Q And that was as part of the execution of the search warrant also, is that right?

A Yes, it was.

Q Was Mr. Horton there at the time of the execution of the search warrant?

A No, he was not.

* * *

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* * *

Q WERE YOU ASSIGNED TO INVESTIGATE THE RESIDENTIAL ROBBERY THAT OCCURRED AROUND JANUARY THE 13TH, 1985 ON BOLLINGER ROAD?

A YES, SIR.

Q DID YOU AS A RESULT OF THAT ASSIGNMENT REVIEW POLICE REPORTS TAKEN BY THE INITIAL INVESTIGATING OFFICERS?

A YES, SIR.

Q AND DID YOU PERSONALLY TALK WITH THE VICTIM OF THE CRIME, MR. WALAKER OVER THE TELEPHONE A DAY OR SO AFTER THE ROBBERY AND GET FURTHER DETAILS OF THE EVENT?

A YES, SIR.

Q IN FACT, DID MR. WALAKER GIVE YOU A POTENTIAL NAME OF A SUSPECT?

A YES, HE DID.

Q BASED ON THAT INFORMATION, DID YOU OBTAIN THE SEARCH WARRANT, BASED ON AN AFFIDAVIT THAT YOU SIGNED?

A YES, I DID.

* * *

Q (BY MR. MARTIN) SERGEANT LARAULT, ON JANUARY THE 30TH, 1985, DID YOU, PURSUANT TO THAT SEARCH WARRANT SEARCH A RESIDENCE IN SAN JOSE?

A YES, I DID.

Q AND WAS THAT THE RESIDENCE OF THE DEFENDANT MR. HORTON?

A YES, IT WAS. ACTUALLY IT WAS IN THE COUNTY OF SANTA CLARA.

Q UNINCORPORATED AREA OF SAN JOSE?

A THAT'S CORRECT.

Q NOW, THE SEARCH WARRANT ITSELF LISTS SOME PROPERTY, MISSING PROPERTY, PROPERTY THAT WAS TAKEN FROM THE VICTIM; IS THAT RIGHT?

A YES, SIR.

Q NOW DOES THE SEARCH WARRANT LIST AN UZI MACHINE GUN, CLOTHING OF THE SUSPECT, HANDCUFF KEY, COIN CLUB TICKET OR REVOLVER OR SHOCKING DEVICES, ANYTHING OF THAT SORT?

A NOT SPECIFICALLY, NO.

* * *

Q (BY MR. MARTIN) IT'S NOT LISTED IN THE SEARCH WARRANT; IS THAT RIGHT, SERGEANT LARAULT?

A YES.

Q WHEN YOU WENT TO THAT RESIDENCE, WHAT WERE YOU LOOKING FOR?

A I WAS LOOKING FOR ITEMS THAT WERE TAKEN FROM MR. WALAKER DURING THE ROBBERY ITSELF. I WAS LOOKING FOR ITEMS THAT WOULD CONNECT THE PERSON AT THE HOME TO ASSOCIATE WITH THE ROBBERY, THINGS USED IN THE ROBBERY TO OBTAIN THE PROPERTY, WEAPONS MENTIONED IN THE POLICE REPORTS, THE CLOTHING DESCRIBED BY THE WITNESSES AND THE VICTIMS IN THE POLICE REPORT.

* * *

Q (BY MR. MARTIN) WERE YOU ATTEMPTING TO MISLEAD THE MAGISTRATE IN SEARCH FOR PROPERTY THAT'S NOT LISTED IN THE SEARCH WARRANT?

MR. MANSFIELD: OBJECTION, SAME CONCLUSION, WHETHER OR NOT HE'S ATTEMPTING TO MISLEAD A MAGISTRATE IS FOR THE TRIER OF THE LAW, AND THE FACTS TO FIND TODAY.

MR. MARTIN: IF IT'S A FACTUAL AREA, YOUR HONOR, I THINK SERGEANT LARAULT'S INTENT IS RELEVANT.

MR. MANSFIELD: I THINK – WOULD THE COURT LISTEN TO SOMETHING FURTHER?

THE COURT: SURE.

MR. MANSFIELD: I THINK THE DOCUMENTS SPEAK FOR THEMSELVES. OBVIOUSLY THE CASE IS SIMPLE. WE HAVE CERTAIN THINGS LISTED IN THAT SEARCH WARRANT, AND HE SEIZED OTHER MATTERS.

NOW WHETHER HE INTENDED TO MISLEAD A MAGISTRATE MEANS NOTHING AT ALL HERE.

WHAT IS THE RULING POINT IN THE ENTIRE CASE IS WHETHER HE ACTED WITHIN THE LAW. SO I WOULD OBJECT TO THAT POINT.

THE COURT: ALL RIGHT, I'LL SUSTAIN THE OBJECTION.

MR. MANSFIELD: THANK YOU.

Q (BY MR. MARTIN) SERGEANT LARAULT, THE PROPERTY LISTED IN THE SEARCH WARRANT INCLUDED SOME JEWELRY, SOME SMALL ITEMS; IS THAT RIGHT?

A YES, SIR.

Q WHEN YOU SEARCHED THE RESIDENCE OF MR. HORTON, WERE YOU LOOKING FOR THAT JEWELRY, THAT STOLEN PROPERTY?

A YES, I WAS.

Q IN THE COURSE OF THAT SEARCH, DID YOU COME UPON SOME WEAPONS THAT YOU BASED YOUR DISCUSSIONS WITH THE VICTIM ON, AND READING THE POLICE REPORTS, RECOGNIZED AS BEING RELATED TO THIS PARTICULAR OFFENSE?

A YES, SIR.

Q WHAT WEAPONS DID YOU FIND DURING THE COURSE OF THE SEARCH FOR THE STOLEN PROPERTY THAT YOU MENTALLY TIED IN WITH THIS OFFENSE?

A I FOUND A USED UZI, SEMIAUTOMATIC RIFLE, AND I FOUND A .38 CALIBER HANDGUN.

[13] Q THOSE WERE LOCATED IN THE RESIDENCE?

A LOCATED IN ONE BEDROOM AND I FOUND NUMEROUS OTHER HANDGUNS AND RIFLES LOCATED IN ANOTHER BEDROOM.

Q DID YOU SEIZE THE OTHER HANDGUNS AND OTHER RIFLES THAT YOU SAW?

A NO, I DID NOT.

Q WHY NOT?

A THE RIFLES WERE NOT THE TYPE THAT WOULD BE DESCRIBED BY THE VICTIM AS BEING POTENTIAL AUTOMATIC WEAPONS.

THE HANDGUNS WERE OF A TYPE LARGER IN SIZE AND DESCRIBED AND DIFFERING IN SIZE AND DESCRIBED BY THE VICTIM OF THE ROBBERY.

Q DID YOU TAKE A LOOK AT THAT UZI GUN AS TO THE BARREL LENGTH AT THE TIME OUT THERE, AT THE SCENE?

A YES, I DID.

Q DID YOU NOTE WHETHER OR NOT IT HAD INTERCHANGEABLE BARRELS SO THAT YOU COULD UNSCREW ONE BARREL AND PUT IN ANOTHER BARREL?

A YES, SIR.

Q HOW MANY BARRELS WERE THERE IN THE CARRYING CASE ASSOCIATED WITH THAT UZI SUB-MACHINE GUN?

A TWO.

Q WAS ONE OF THE BARRELS SHORT ENOUGH SO THAT IT WOULD CONSTITUTE AN ILLEGAL WEAPON; DID YOU NOTICE THAT AT [14] THE TIME?

A YES.

Q DID YOU AT THE TIME THAT YOU SEIZED THE UZI, KNOW WHETHER OR NOT THAT WAS AN ILLEGAL WEAPON, BECAUSE THAT BARREL WAS TOO SHORT?

A YES.

Q DID YOU SEIZE ANY SHOCKING DEVICES, SEIZURES OR HAND HELD SHOCKING DEVICES?

A YES, I DID.

Q WHAT WAS THE BASIS FOR THAT SEIZURE?

A THE VICTIM MENTIONED TO ME THAT DURING THE COURSE OF THE ROBBERY HE HAD BEEN SHOCKED OR RECEIVED A SHOCKING SENSATION TO THE BACK SIDE OF HIS BODY ON NUMEROUS OCCASIONS. AND WHEN I LOCATED TWO STUN GUNS, THE DESCRIPTION AND OBSERVATION, WHEN I SAW, LOOKED AT THE TWO ITEMS, THE DESCRIPTION WHAT THE VICTIM DESCRIBED TO ME HE SUFFERED DURING THE TIME OF THE ROBBERY.

Q DID YOU SEIZE ANY CLOTHING?

A YES, I DID.

Q WHY DID YOU SEIZE THE CLOTHING THAT YOU DID SEIZE?

A THE VICTIM AND THE WITNESSES COLLECTIVELY GAVE ME A DESCRIPTION OF WHAT THEY OBSERVED THAT EVENING, AND THE CLOTHING I TOOK FROM THE HOME IN MY ESTIMATION MATCHED THE DESCRIPTION GIVEN TO ME BY THOSE PEOPLE.

[15] Q JUST FOR THE RECORD, CAN YOU BRIEFLY DESCRIBE THE CLOTHING THAT YOU SEIZED?

A I REMOVED TWO JACKETS FROM THE PREMISES, BOTH ARE BEIGE IN COLOR, ONE WAS A HOODED JACKET, AND ONE WAS A JACKET WITHOUT A HOOD, AND A PAIR OF POLYESTER TROUSERS, MEN'S POLYESTER TROUSERS.

Q DID YOU SEIZE ANY HANDCUFFS OR HANDCUFF KEYS?

A YES, I SEIZED A HANDCUFF KEY.

Q WHY DID YOU DO THAT?

A THE VICTIM DURING THE ROBBERY HAD BEEN HANDCUFFED BY A PAIR OF HANDCUFFS AND THE HANDCUFF KEY I LOCATED IN THE HOME WHICH WAS ON A KEY RING, THE TYPE OF HANDCUFF KEY THAT WOULD UNLOCK THAT TYPE OF HANDCUFF USED ON THE VICTIM.

I THOUGHT IT MIGHT BE OF EVIDENTIAL VALUE, THEREFORE, I REMOVED IT FROM THE PREMISES.

Q DID YOU SEIZE ANY PAPER WORK OR PARAPHERNALIA THAT WOULD BE ASSOCIATED WITH A COIN CLUB CONVENTION?

A YES, I DID.

Q WHY DID YOU SEIZE THAT?

A THE VICTIM TOLD ME THAT THE PERSON HE FELT WAS ONE OF TWO PARTIES INVOLVED IN THE ROBBERY. HE IS AT THE COIN SHOW THAT HE JUST CAME FROM THE NIGHT OF THE ROBBERY.

WHAT I FOUND IN THE HOME WAS A DOCUMENTATION INDICATING THAT SOMEBODY HAD POSSIBLY BEEN TO THAT COIN SHOW.

Q IN FACT, DO YOU RECALL THE DATE OF THE TO THE COIN SHOW?

A NO, NOT AT THIS TIME. I CAN'T SAY, THOUGH I RECALL IT BEING THE WEEKEND AT WHICH THE EVENTS TOOK PLACE.

Q YOU CAN'T RECALL IF IT WAS FOR JANUARY 13TH, THE DAY OF THE ROBBERY OR NOT?

A NOT AT THIS TIME, NO SIR.

* * *

Q (BY MR. MARTIN) THE UZI MACHINE GUN, WAS THAT SECRETED SOMEWHERE OR WAS THAT OUT IN THE OPEN?

A THAT WAS SECRETED INSIDE A CAMOUFLAGE CARRYING CASE.

Q WAS THAT CARRYING CASE SUCH THAT CONCEIVABLY STOLEN JEWELRY OR MONEY COULD HAVE BEEN INSIDE?

A YES, THAT'S POSSIBLE.

Q THE BROWN HANDLED REVOLVER THAT YOU DID SEIZED, WHERE WAS THAT IN THE HOUSE? HOW WAS THAT LOCATED? WAS IT OUT IN THE OPEN OR COVERED UP OR WHAT?

A IT WAS IN PLAIN VIEW LOCATED IN THE BEDROOM IN [17] THE HOME.

Q THE SHOCKING DEVICES, WERE THEY IN PLAIN VIEW OR WERE THEY COVERED UP?

A THEY WERE IN – ONE WAS IN PLAIN VIEW IN THE DINING ROOM AREA, AND THE OTHER ONE WAS INSIDE OF A MARKED – A BOX.

Q DID THE BOX HAVE SOME KIND OF WRITING ON IT THAT TOLD YOU WHAT WAS INSIDE?

A THE BOX HAD A WRITING ON IT, ALSO A DRAWING OF THE OBJECT ITSELF.

Q SO BASED ON THAT, DID YOU HAVE SOME SUSPICION AS TO WHAT WAS INSIDE THE BOX?

A YES, SIR.

Q THE COIN CLUB TICKET, WAS THAT IN PLAIN VIEW?

A YES, IT WAS. IT WAS ON A DRESSER IN A BEDROOM.

Q THE CLOTHING?

A THE FIRST JACKET I DESCRIBED THE CLOTHING WITH THE HOOD, WAS INSIDE OF A CLOSED – I SAY CLOSED – WHERE I LOCATED THE JACKET, WAS IN A CLOSET, THAT PORTION OF THE CLOSET HAD A DOOR WITH A LOCK ASKEW.

THE OTHER JACKET WAS IN PLAIN VIEW, SITTING ON THE BACK OF A CHAIR IN THE DINING ROOM AREA OF THE HOME.

Q AND THE HANDCUFF KEY, WAS THAT IN PLAIN VIEW?

A YES, IT WAS.

Q WHERE WAS THAT?

A THAT TOO WAS ALSO IN THE LIVING ROOM AREA, THE DINING ROOM AREA AT THE SAME HOME ON A SHELF.

* * *

Q (BY MR. MANSFIELD) SERGEANT, YOU RECALL TESTIFYING AT THE PRELIMINARY EXAMINATION?

A YES, SIR.

Q THE PURPOSE OF YOUR SEARCH THERE WAS TO SEARCH FOR THE TYPE OF WEAPON USED IN THE ALLEGED ROBBERY, WASN'T IT?

A NO, SIR.

Q THE PURPOSE OF YOU SEARCH WAS TO LOOK FOR WEAPONS, WASN'T IT?

A THAT'S A TWO-WAY ANSWER. THE PURPOSE OF MY SEARCH, SIR, WAS TO LOOK FOR EVIDENCE THAT WOULD TIE IN MY HORTON, YOUR CLIENT, WITH THE ROBBERY.

Q WERE YOU LOOKING FOR A MASK THAT COVERS ONE'S [19] HEAD, YES OR NO?

A YES, I WAS.

Q WERE YOU LOOKING FOR GLOVES?

A YES, I WAS.

Q PAGE 154, IF THE COURT PLEASE, AT THE PRELIMINARY, COUNSEL, WERE YOU LOOKING FOR A WEAPON? THIS IS LINE TWENTY-SEVEN. WERE YOU LOOKING FOR A WEAPON?

A YES.

Q WERE YOU LOOKING BOTH FOR THE WEAPON DESCRIBED BY THE VICTIM AND ALSO THE ONE HELD BY ONE SUSPECT AS HE – AS DESCRIBED BY MR. – AS HE DESCRIBED AND THE OTHER WEAPON BEING A SMALL HANDGUN?

A YES.

Q WERE YOU LOOKING FOR SOME KIND OF A DEVICE THAT WOULD PRODUCE A SHOCK OR BURNING SENSATION?

A YES.

Q WERE YOU LOOKING FOR HANDCUFFS OR SIMILAR HANDCUFFS OR KEYS THAT WOULD UNLOCK THE SAME?

A YES.

Q WERE YOU LOOKING FOR EVIDENCE OF THE SAN JOSE COIN SHOW?

A YES. I ASSUME YOU'RE ASKING ME DID I HAVE THIS KNOWLEDGE THAT I WOULD FIND THIS IN THE HOME PRIOR TO ENTRY OF THE HOME, THAT'S WHAT YOUR QUESTION IS?

Q NO, SERGEANT, I'M ASKING YOU WAS THAT THE [20] PURPOSE OF YOUR SEARCH?

A YES, PURPOSE OF MY SEARCH WAS TO ENFORCE THE PAPER AS I SO HAD IN MY HAND AT THE TIME I WALKED INTO THE HOUSE, ISSUED TO ME BY THE D.A.'S OFFICE.

Q DO YOU RECALL MAKING THIS STATEMENT, PAGE 155 LINE SEVEN: I WAS LOOKING FOR SOME EVIDENCE OF THE SAN JOSE COIN SHOW, AND TO FIND OUT IF IN FACT MR. HORTON WAS AT THE COIN SHOW. THAT'S LINE EIGHT.

DO YOU RECALL MAKING THAT STATEMENT?

A YES.

Q DO YOU RECALL MAKING THIS STATEMENT, IN RESPONSE TO THIS QUESTION, PAGE 154 OF THE PRELIMINARY EXAMINATION, LINE TWENTY-TWO: WHAT IN PARTICULAR WERE YOU LOOKING FOR WHEN YOU EXECUTED THE SEARCH WARRANT OTHER THAN THE PROPERTY EXCLUDING FOR THE PURPOSE OF THE QUESTION OTHER THAN THE PROPERTY THAT HAD BEEN TAKEN FROM THE VICTIM?

ANSWER: I WAS LOOKING FOR SOME TYPE OF MASK THAT COVERS ONES HEAD. I WAS LOOKING FOR GLOVES, I WAS LOOKING FOR A WEAPON, BOTH THE WEAPON DESCRIBED TO ME BY THE VICTIM IN MY INTERVIEW, AND ALSO THE ONE HELD BY ONE SUSPECT AS HE DESCRIBED, BY MR. HORTON, AND THE OTHER WEAPON BEING THE SMALL HANDGUN BEING HELD BY THE SECOND SUSPECT.

I WAS LOOKING FOR SOME KIND OF DEVICE THAT WOULD [21] PRODUCE A SHOCK OR BURNING SENSATION.

I WAS LOOKING FOR HANDCUFFS OR SIMILAR HANDCUFFS THAT INDICATED MORE HANDCUFFS COULD BE FOUND OR KEYS FOR THE HANDCUFFS TO UNLOCK SAME.

I WAS LOOKING FOR SOME EVIDENCE OF THE SAN JOSE COIN SHOW, AND TO FIND OUT IF IN FACT MR. HORTON WAS AT THE COIN SHOW.

DO YOU RECALL MAKING THAT STATEMENT IN RESPONSE TO THAT ANSWER?

A YES, SIR.

Q OKAY. NOW NONE OF THAT, YOU WILL AGREE WITH ME, WAS LISTED ON THE SEARCH WARRANT, WAS IT, SERGEANT LARAULT?

A YES, SIR, IT WAS NOT.

Q AND THE UZI WHICH YOU DESCRIBED AS A MACHINE GUN, ISN'T THAT JUST AN AUTOMATIC RIFLE, REALLY?

A YES, SEMIAUTOMATIC RIFLE.

Q IT'S NOT DESCRIBED, IT'S DESCRIPTION AS A MACHINE GUN IS IN ERROR; IS THAT NOT CORRECT?

A MY DESCRIPTION OF THE –

Q YES. IT IS NOT A MACHINE GUN, IS IT?

A NO, I DON'T RECALL EVER DESCRIBING IT AS A MACHINE GUN.

Q SERGEANT, I'M HAVING A GREAT DEAL OF DIFFICULTY HEARING YOU.

[22] A I'M SORRY, I DIDN'T REALLY DESCRIBE IT MYSELF AS A MACHINE GUN. I DESCRIBED IT AS A SEMIAUTOMATIC RIFLE.

Q WHEN YOU FOUND THIS UZI U-Z-I RIFLE, IT WAS IN A CASE, WASN'T IT?

A YES, IT WAS.

Q WAS IN A CARRYING CASE, WASN'T IT?

A YES, IT WAS.

Q IT WAS ON THE FLOOR OF THE BEDROOM, WAS IT NOT?

A YES, IT WAS.

Q AND THE CARRYING CASE WAS CLOSED, ISN'T THAT CORRECT?

A YES.

Q WHEN YOU LOOKED AT IT, YOU KNEW EXACTLY WHAT THAT CARRYING CASE CONTAINED, DIDN'T YOU?

A I KNEW IT COULD POSSIBLY CARRY THE WEAPON, YES.

Q AND THERE WAS NO THOUGHT GOING THROUGH YOUR MIND AT THAT TIME THAT YOU MIGHT FIND JEWELS IN THERE; IS THAT CORRECT?

A THAT'S NOT TRUE.

Q WHEN YOU FOUND THE CARRYING CASE AND OPENED THE CASE, YOU PULLED OUT THE SEMIAUTOMATIC RIFLE, DIDN'T YOU?

[23] A YES, I DID.

Q AND IT HAD A BARREL ATTACHED TO IT?

A YES, IT DID.

Q WHAT LENGTH OF BARREL?

A TOP OF MY HEAD I CAN'T TELL YOU RIGHT NOW. IT WAS TWO BARRELS IN A CARRYING CASE, ONE ATTACHED TO THE WEAPON, ONE ALONG SIDE OF IT.

Q WELL SERGEANT, AS YOU CAME UPON AND PULLED IT OUT OF THE CARRYING CASE, IT DID NOT QUOTE CONSTITUTE ANYTHING ILLEGAL, DID IT?

A YES, IT DID. IT APPEARED TO ME TO BE THE DESCRIBED LENGTH OF A WEAPON, THEREFORE I PULLED IT OUT TO MEASURE IT.

Q THEN YOU WENT INTO THE CLOSET AND REMOVED SOME CLOTHES; IS THAT CORRECT?

A YES.

Q WHERE DID YOU FIND THE TROUSERS?

A HANGING IN THE CLOSET.

Q AND THE TICKET STUB DIDN'T LOOK LIKE CONTRABAND TO YOU, DID IT, THAT WAS LYING ON THE DRESSER SHELF?

A NO, LOOKED LIKE SOMETHING TO INDICATE TO ME THAT THE PERSON AT THAT HOME HAD BEEN TO THAT COIN SHOW.

Q NOW HOW MANY KEYS WERE ON THAT KEY RING WHERE YOU FOUND THIS HANDCUFF KEY?

A WITHOUT LOOKING AT MY NOTES, I BELIEVE I'D ESTIMATE BETWEEN SEVEN AND NINE KEYS.

Q YOU HAD TO PICK UP THE KEY RING, DIDN'T YOU, TO LOOK CAREFULLY AT THE HANDCUFF KEY?

A NO.

Q COULD YOU SEE IT WITHOUT PICKING IT UP?

A YES. THIS IS WHY I PICKED IT UP.

Q AND THE HANDGUN ITSELF WAS NOT CONTRABAND, WAS IT?

A NO.

* * *

MR. MARTIN: ONE QUESTION, YOUR HONOR. SERGERANT LARAULT, AT THE TIME OF THE EXECUTION OF THE SEARCH WARRANT, DID YOU KNOW THAT MR. HORTON, THE DEFENDANT, WAS A CONVICTED FELON?

A NO, I DID NOT.

* * *

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,
Plaintiff and Respondent,
v.
TERRY HORTON,
Defendant and Appellant.
_____/

No. H002749

(Santa Clara County
Sup.Ct.No. 101741)

In Re TERRY HORTON on
Habeas Corpus
_____/

No. H004177

Appellant Terry Horton was charged with residential robbery (Pen. Code, §§ 211-213.5), false imprisonment (§§ 236-237), possession of a concealable firearm by an ex-felon (§ 12021, subd. (a)) and possession of a short barrelled Uzi machine gun (§ 12020, subd. (a)). A jury found him guilty on all counts and found the allegation true that he had personally used the Uzi in the commission of the offenses charged in counts I and II. He was sentenced to eight years eight months in state prison. He appeals the judgment of conviction, raising these contentions:

1. Property was illegally seized from his home;

2. He received ineffective assistance of counsel;

3. There was prosecutorial misconduct; and

4. He was improperly sentenced.

In connection with the second of these contentions Horton has filed a petition for a writ of habeas corpus.

We will consider the writ petition in our discussion of issues involving ineffective assistance of counsel.

We affirm the judgment of conviction and deny the writ petition.

FACTUAL BACKGROUND

The Robbery

Erwin Paul Wallaker (Wallaker)a was the treasurer of the San Jose Coin Club. His duties included collecting the revenues generated by the club's annual coin show. In 1985 the show was held on January 11, 12 and 13 at the San Jose Convention Center. At the end of the third day, a Sunday, Wallaker left the convention center with approximately $10,000 in cash and currency in one briefcase, approximately $20,000 in collector coins of his own in another briefcase and approximately $1,200 on his person. He placed the briefcases in the trunk of his car.

Wallaker proceeded directly home, arriving around 6:30 p.m. He backed his car into the driveway, activated the garage door opener, and entered the garage on foot. Toward the rear of the garage he was surprised by two men wearing Halloween masks which covered their heads. One held a machine gun and the other a "stunning" device. The first man demanded money while the second administered a series of shocks with the stun gun. Wallaker was eventually forced to the floor and handcuffed. He nonetheless attempted to keep the two men talking, because he had noticed that the first one had a strong southern accent which sounded familiar to him.

This man was of medium height and build. Both men work dark clothes.

The second assailant removed three rings Wallaker was wearing and took his billfold and credit card case while the first held the machine gun on him at close range. Wallaker's feet were bound and he was hogtied, gagged and partially blindfolded.

The man with the machine gun wanted to know where the rest of the money was. Wallaker pointed out a safe in the garage and one of the men removed the contents, consisting of several rings belonging to Wallaker's wife, some uncut rubies and a wristwatch. At some point the man with the stun gun produced a blue-steel short-barreled revolver. He rubbed it up against Wallaker's face, shone the flashlight on it and threatened to us it.

The robbers demanded the car keys and eventually located them where Wallaker had tossed them. Wallaker heard the car door open and close, which prompted him to renew his efforts to make noise in the hopes of attracting help. This precipitated further threats from one of the assailants who returned to the garage, hit Wallaker over the head, and dragged him back further from the garage door. Wallaker heard the car door open and close again and then silence.

He wriggled toward the front of the garage, yelling for help, and was able to attract the attention of three passersby. These three people came to his aid and called the police. The robbers had run off.

The police arrived at approximately 7:00 p.m. Wallaker gave a statement and then was taken to emergency where he received several stitches on the back of his head.

The three rescuers also gave statements. Lisa Miller, James Burwell and Jeff Beaulieu were walking along the street where Wallaker lived when a man rushed past them coming from the direction of Wallaker's house. The man was walking hurriedly, hunched over with his head down. He was of medium build and had longish gray-white hair. He was carrying something under his right arm which Miller thought was a gun and the others thought might be an umbrella.

The Search of Defendant's House

Sometime in the early hours of the morning after the robbery, Wallaker realized that he recognized the voice of the man with the southern accent as that of Terry Horton. Wallaker knew Horton as a fellow coin collector. He had seen Horton at various coin club meetings over the course of approximately five years and the two had spoken to each other on perhaps two dozen occasions. He had recently talked with Horton as a meeting approximately three weeks prior to the robbery. And he had noticed Horton in attendance at the coin show on the Sunday of the robbery.

Wallaker contacted the police with this information the morning after the robbery. He met with Sergeant Gary Larault and made a positive ID of Horton from a mug shot. Larault then prepared a photo lineup and contacted Miller, Burwell and Beaulieu. Lisa Miller identified a

picture of Horton as the man she had seen that night. The other two were not able to make an identification.

On January 28, 1985, a search warrant issued, authorizing the search of Horton's house for articles taken in the robbery. The eight-page police report of the crime was appended to the affidavit supporting the search warrant.

The Horton house was searched January 30, 1985. An Uzi machine gun, with a long and a short barrel and loaded clips, and a loaded blue-steel .38 caliber revolver were found in the master bedroom. On a bookshelf in the dining room were two Nova XR 5000 stun guns in operating condition. A set of handcuff keys, an announcement advertising the San Jose Coin Club show, and some clothes were also removed. None of the items stolen from Wallaker's person or from his garage safe was recovered from the house; nor were any Halloween masks found.

Horton surrendered himself on June 10, 1985, after a warrant issued for his arrest.

Witnesses for the Prosecution

Wallaker testified that the Uzi machine gun, the blue-steel .38 revolver and the Nova stun gun appeared to be the weapons used against him during the burglary.

Wallaker was an ex-Air Force pilot. As a pilot he had been trained invoice identification. He had a practiced ear and was used to listening carefully to people's voices. He was 100 percent certain that the voice of the man who robbed him was Horton's.

The stun gun had produced numerous red welts on Wallaker's back. James Scroggins, an expert on stun guns,

testified that the only stun gun on the market in January of 1985 which would have caused the effects described by Wallaker was the Nova XR 5000.

Wallaker testified that when he had seen Horton several weeks before the robbery, at a coin club meeting, Horton had shoulder length gray hair. He also thought Horton's hair was gray when he glimpsed Horton at the coin show on the day of the robbery. Officer Larault testified that when Horton surrendered himself on June 10, 1985, he took Horton's picture. That picture was admitted into evidence and showed Horton with shoulder length gray hair.

Lisa Miller and James Burwell testified that the man they saw hurrying from the direction of Wallaker's house the evening of the robbery had collar or shoulder length gray hair, and a medium build. Miller testified that at the time she picked Horton's picture from the photo lineup shortly after the robbery, she was "pretty certain" that was the man she had seen. At trial she was unable to say whether Horton was the man she had seen that night or not.

The Defense

Horton's defense was an alibi. He testified that at the time of the robbery he was at home watching TV and playing cards. His wife, his son, his daughter and two friends corroborated this testimony.

Horton, his wife, and his daughter Cathy all gave substantially the same account of events on January 13, 1985. Around noon they went to the coin show, together

with Cathy's boyfriend Jim Nash. They stayed until approximately 3:30 p.m. and then returned home. Jim and Cathy went out to get pizza and the four ate dinner together and then played cards. Two friends of the family, Vernon Burgess and Joe DeAngelo, dropped by and Horton's son Terry came home during a break from work. All of these witnesses remembered that "60 Minutes" came on the TV while they were at the Horton house because Horton and Jim Nash argued about whether to watch it or not. That show starts at 7:00 p.m.

Terry Jr. was at work that night. He punched out at 6:46 p.m. and went home to feed his puppy. He arrived home shortly before 7:00 and found the others there playing cards with the TV on. Terry's friend Joe DeAngelo dropped by at about the same time. Vernon Burgess testified that he came by the Hortons' that night around 6:30 to borrow money to go to his father's funeral. Horton loaned him the money and he stayed the whole evening.

The defense stressed that Horton's hair had not been long and gray at the time of the robbery. Various witnesses testified that Mrs. Horton had applied a rinse to Horton's hair in late December which had turned his normally white hair to a blond-brown with red highlights. Burgess remembered this in particular because Mrs. Horton had done the same rinse on his hair at the same time and it was too red. San Jose coin dealer Sheldon Wirt testified that he talked with Horton briefly at the coin show on Sunday and that Horton's hair was a reddish-orange color on that day. Finally, Horton's brother John testified that Horton's hair was brownish-

blond and somewhat short in January of 1985. He remembered because it was such a contrast from the previous month when his hair had been white on the occasion of his son's wedding. Horton testified that his hair had been silvery-white for his son's wedding in December of 1984. Shortly thereafter his wife had given his hair a red rinse. By June, when he surrendered himself to the police, the rinse had washed out and his hair color had returned to its natural gray-white.

There was evidence that Horton was an avid gun collector and that various family members enjoyed target shooting at the rifle range. Cathy Horton testified that her dad had given her the .38 for her protection when she had lived away from home. The stun gun was also for her protection, since she came home late from a night class at San Jose State. Mrs. Horton owned several guns. She testified that Horton had given her the Uzi and that it was a collector's item. Horton's brother John testified that he and his brother had each bought stun guns for use by female family members.

Horton took the stand and recounted the events of January 13, 1985, as we have summarized above. He denied any involvement in the crime. He stated that he had not seen Wallaker at any coin club meeting in December of 1984. He knew Wallaker and testified that he had noticed him at the January coin show. He described two incidents involving Wallaker, both of which occurred in 1975 or 1976. Horton's 10-year-old daughter had bought some coins from Wallaker which Horton felt were overpriced and overgraded. He argued with Wallaker and threatened to inform the president of the club if Wallaker did not buy back the coins. Eventually Wallaker refunded

his daughter's money. The second incident occurred at another coin show. Wallaker was talking to several people and Horton attempted to interrupt him to ask a question. Wallaker ignored him and Horton made a disparaging remark, at which Wallaker took offense. Horton surmised that Wallaker was implicating him in the robbery because of bad feelings stemming from these incidents.

Defense introduced a brochure from the coin show, with the purpose of demonstrating that anyone attending that show could have "cased" Wallaker for a later robbery. The brochure listed the officers of the sponsoring San Jose Coin Club, including Wallaker as treasurer, and also showed a layout of the floor, indicating where each dealer's table was. Wallaker's table was identified on this diagram.

DISCUSSION

I. SEIZURE OF EVIDENCE DURING THE WARRANT SEARCH

At the conclusion of the preliminary hearing defense moved to suppress all evidence seized during the warrant search on the ground that the warrant authorized a search only for those items stolen during the robbery. The magistrate granted the motion to suppress and held Horton to answer. The information was filed in superior court, after which the People moved to reverse the magistrate's order. A hearing was held on September 23, 1985, and the superior court granted the People's motion.

The search warrant instructs the finder to search Horton's house for "the items described and sketched on the attached 'San Jose Police Department Property

Report". This report describes only the three rings Wallaker was wearing and the ring, watch and rubies taken from the safe.

Horton's argument is two-fold: Seizure of evidence not listed in the search warrant cannot be justified under the so-called "plain view" doctrine because discovery of these items was not "inadvertent"; and the police officers could not show a sufficient connection between the items seized and criminal activity.

The Inadvertence Requirement

Horton relies primarily upon *Coolidge* v. *New Hampshire* (1971) 403 U.S. 443 in arguing that items not listed in the warrant may be seized only if discovered inadvertently. He contends that the police in this case expected to find weapons in his home and intended to seize them.

The California Supreme Court, in *North* v. *Superior Court* (1972) 8 Cal.3d 301, observed that the portion of the *Coolidge* opinion which proposed this restriction of the plain view doctrine was signed by only four members of the court, with four expressly disagreeing. Hence the issue was not actually decided and *Coolidge* has no precedential effect on this point. (*Id.* at pp. 307, 308.)

California cases cited by Horton (*People* v. *Albritton* (1982) 138 Cal.App.3d 79 and *People* v. *Murray* (1978) 77 Cal.App.3d 305) follow *Coolidge* without addressing the impact of *North*. As we announced in *People* v. *Miller* (1987) 196, Cal.App.3d 846, "[w]e are persuaded that the Supreme Court specifically rejected the inadvertence requirement in *North*, and, consequently, we are bound by

stare decisis to follow the Supreme Court's position on this issue. (*Id.* at p. 851.)

In short, there is not 'inadvertence' requirement in California. "[T]he fact that the officer had foreknowledge of the presence of the evidence in that place is of no constitutional significance." (*Ibid.*)

The Nexus Requirement

In *Arizona* v. *Hicks* (1987) 107 S.Ct. 1149, the U.S. Supreme Court determined that the police may not seize property in plain view unless the officer has probable cause to believe that the item in question is evidence of a crime or contraband. As expressed by the California Supreme Court, the officer must be "presently aware of some specific and articulable fact from which a rational link between the item seized and criminal behavior can be inferred." (*People* v. *Superior Court (Meyers)* (1979) 25 Cal.3d 67, 73.)

Horton takes the position that this "nexus" was not present here. This argument goes as follows: At the time of the search the police did not know that Horton was an ex-felon. The handgun by itself was therefore not contraband. Neither were the coin show advertisement, the handcuff keys or the clothes. The Uzi was concealed in a gun case; since the short barrel was not attached at the time it was found, it was also not contraband.

This argument is without merit. The eight-page police crime report, which described the robbery in considerable detail, was attached to the affidavit supporting

the search warrant. Sgt. Larault, who executed the warrant, testified that he was fully apprised of the details of the robbery. On the basis of the information contained in the police report, law enforcement officers conducting the search selectively seized only those items of evidence they believed to be weapons or articles used in the commission of the robbery. Although numerous other handguns and rifles were located at the residence, they were not seized because there was no "nexus" to this crime.

Authorities offered by Horton in support of his position are inapposite. In *People* v. *Murray, supra,* 77 Cal.App.3d 305, police seized two television sets not described in the warrant based upon their observations upon entering the premises of some 67 television sets, many with the serial numbers removed. The court held that these circumstances did not establish that the officers in fact knew which items were contraband and which were not. (*Id.* at pp. 311-312.)

Similarly in *Nunes* v. *Superior Court* (1980) 100 Cal.App.3d 915 the court invalidated the seizure of certain items taken on the general suspicion that they matched descriptions of stolen property contained in police reports not in the searching officer's possession.

Clearly these cases are not on point. The officers in our case were in possession of the police report describing the crime and their search was directed to items connected to that crime. There is no indication that they used the warrant as a pretext to conduct a general exploratory search of Horton's residence.

II. COMPETENCE OF COUNSEL

The contentions in this section present the question whether Horton received effective assistance of counsel. In addition, in the following section regarding claimed prosecutorial misconduct, Horton contends that his attorney was inadequate in certain instances in failing to assert timely objections. In general terms Horton complains that trial counsel should have kept from the jury inadmissible evidence which impugned his character and tainted the entire case against him. The appeal and accompanying habeas petition raise identical issues. We will discuss them together while reserving some comments on the writ petition at the conclusion of section III.

In order to prevail on a claim of ineffective assistance of counsel, an appellant has the burden of proving by a preponderance of the evidence that (1) counsel's representation was deficient in that it fell short of prevailing professional standards of reasonableness, and (2) there is a reasonable probability that but for counsel's errors the result of the case would have been different. (*People* v. *Ledesma* (1987) 43 Cal.3d 171, 215-218; *Strickland* v. *Washington* (1984) 466 U.S. 668, 687.) Even if the burden is met in the first step, the claim is not proved unless the required prejudice is shown.

Failure to Stipulate to the Prior Conviction—

Horton was charged in Count III with possession of a firearm by an ex-felon (Pen. Code, § 12021, subd. (a)).

On the first day of trial defense counsel made two motions. First he sought to have the prior offense tried

separately from the present offenses. Secondly, he sought to exclude use of the prior offense for impeachment purposes on the ground that the prior was too remote to have any probative value. The court denied both motions.

By virtue of the reading of the information, the jury was informed that the charges against Horton included an allegation that he had been convicted of a burglary in Tennessee. When Horton took the stand defense counsel asked him about the prior conviction. He testified that in 1967 in Memphis, Tennessee, he had pleaded guilty to three counts of third degree burglary, possession of burglary tools, and burglary and larceny of an automobile. At that time he was 35.

Horton argues that, rather than let in this evidence, counsel should have stipulated to his ex-felon status for purposes of establishing the necessary element of Count III. By so doing he could have kept the details regarding the nature of the prior conviction from the jury. Such a procedure was expressly sanctioned by the Supreme Court in the case of *People* v. *Valentine* (1986) 42 Cal.3d 170. In *Valentine* the high court considered the effect of Proposition 8 on the rule laid down by *People* v. *Hall* (1980) 28 Cal.3d 143. *Hall* had held that when a prior conviction is pertinent only to ex-felon status as an element of a currently charged offense, the jury may not learn either the fact or the nature of the prior conviction if defendant offers to stipulate he is an ex-felon.

Proposition 8 was passed by the voters in 1982, adding section 28 to article I of the state Constitution. The

second sentence of subdivision (f) of this section, apparently directed at *Hall*, provides that "[w]hen a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court."

In *Valentine*, defendant offered to concede his prior convictions for purposes of establishing that element of a Penal Code section 12021, subdivision (a) charge; however, the trial court ruled that section 28, subdivision (f) required full disclosure of the nature of the priors in open court. The Supreme Court found that ruling to be error. *Any* prior felony, regardless of its nature, satisfies the ex-felon element of the offense. The nature of the prior is therefore not relevant evidence. (*Valentine, supra*, 42 Cal.3d at pp. 176-177.) The court concluded that Proposition 8 does not require the nature of prior convictions to be proven to the jury if defendant stipulates to his ex-felon status. (*Id.* at pp. 181-182)

It is apparent from the record that Horton's attorney was unaware of the *Valentine* decision, which was handed down July 21, 1986, approximately 10 weeks prior to the start of trial on October 7. The following exchange ensued during the discussion of counsel's motions.

"The Court: . . . The constitution prevents you from stipulating to the status part of the crime in order to keep the proof of the prior out of the record.

"Mr. Mansfield [Defense Counsel]: Yes.

"The Court: Prop. 8 truth in evidence law clearly makes, gives the prosecutor the right and the authority

and the duty to prove prior convictions where they constitute an element of the offense. So I don't believe I have a lot of choice in that matter."

Because the judge thought that the nature of the prior would have to be disclosed in open court, he saw no point in granting counsel's motion to keep the prior out for purposes of impeachment. He did, however, comment that "if the prior were discharged for enhancement I would be disposed to give you a protective order because a 23 year old prior would have very little probative value on questions of impeachment, but I don't think I have a lot of discretion in the matter."

Thus it appears that the nature of the prior conviction would not have come in at all, either in connection with the section 12021 offense or for purposes of impeachment, had counsel made the stipulation provided for by *Valentine*/

But we cannot find that counsel's omission prejudiced his client. Under *Valentine*, the jury would still have been informed of the bare fact that Horton had a prior felony conviction. While it forestalls the direct introduction of possibly prejudicial evidence, the *Valentine* stipulation creates a perhaps greater risk of harm. As the court observed in *People* v. *Rollo* (1977) 20 Cal.3d 109, 119: "[I]t is highly unlikely that a jury which is advised only that the defendant has been convicted of 'a felony' will let the matter rest. Normal human curiosity will inevitably lead to brisk speculation on the nature of that conviction, and the range of such speculation will be limited solely by the imaginations of the individual jurors. Some may assume, for example, that the defendant's prior conviction was

similar to or identical with the charge for which he is on trial. Others may speculate that the conviction involved some form of unspeakable conduct, such as torture murder, gang rape, or child molestation. Why else, the jurors might naturally ask, was the name of the crime withheld from them?" (*Id.* at p. 119, fn. omitted.)

Valentine is thus a double-edged sword. It may well be advisable to "sanitize" the prior where that conviction was for the same crime (or a worse one), committed recently, as was the case in *Valentine*. On the other hand, where defendant's prior is remote and for a crime different from the one charged, as in Horton's case, *Valentine* cuts the other way. In such a case it may behoove a defendant to make a clean breast of it before the jury and demonstrate that he has nothing to hide, rather than allow the jurors to speculate about the nature of his prior conviction.

We cannot say that reasonably competent defense counsel, with knowledge of *Valentine* would necessarily have chosen to stipulate to his client's ex-felon status in this case. Consequently, we cannot find that the error here requires reversal. Moreover, any prejudicial effect ~~was mini~~mized by the remoteness of the prior as well as by limiting instructions given to the jury regarding the use of the evidence.

The Tape Recording

As part of the People's case in rebuttal, the District Attorney introduced into evidence a tape recording of

telephone conversations between Sgt. Larault and Horton's wife and between the sergeant and Horton himself. The first part of the tape was played without objection.

In a conversation on March 21, 1985, Larault asked Mrs. Horton whether she went to the coin show Sunday, January 13. She responded that she had been advised by her husband's lawyer not to answer any questions. Sgt. Larault informed her that she was not bound to follow the advice of her husband's lawyer. He suggested that she call the lawyer and discuss the matter with him and that he, Larault, would do the same, after which he would call her back. In the next conversation, March 23, Mrs. Horton told Larault that she went to the coin show that Sunday. She could not, however, remember any specific times or details regarding her activities after the show. She asked Larault why he was questioning her. Whereupon Sgt. Larault began to explain to her the various events leading up to the issuance of the search warrant and the search of the residence.

At some point in this monologue, defense counsel objected on the basis that the recorded material did not rebut any witness testimony. The court asked counsel: "Have you gone over this tape to determine if parts should be excised . . . ?" Counsel responded, "No, I am prepared to do so. I never thought we were going to hear these tapes, frankly." The court then dismissed the jury in order to discuss with counsel whether portions of the tape might be deleted.

Out of the presence of the jury the first portion of the tape was replayed. Counsel objected to the introduction of Sgt. Larault's statements and the judge agreed to

admonish the jury that the taped conversations were to be considered only for the statements of Mrs. Horton, and that the officer's statements were to be disregarded except where they gave meaning to Mrs. Horton's responses.

Defense counsel lodged a continuing objection to use of the tape on the basis that it was improper rebuttal evidence. The jury was called back, given the requested admonishment, and the tape was started from the beginning of the conversation.

At the end of the conversation with Mrs. Horton, Horton came on the line. There ensued a conversation where Horton demanded the return of property seized from his house by the police, and Officer Larault explained that certain property had been possessed illegally: namely the Uzi with the short barrel, and an impermissible quantity of marijuana. Horton protested that the marijuana was for home consumption by all five residents, whereupon the officer responded that the presence of some scales indicated that marijuana was being weighted and sold there.

Horton was unable to give any more details about the timing of his activities on January 13. He did, however, offer to meet with Larault, in the presence of his attorney. The conversation ended with Larault saying "You have nothing to hide[,] Wright?" and Horton responding: "I don't want to help you tidy up a circumstantial case against me. . . ."

Horton raises the following points concerning counsel's handling of the tape recording: 1) Counsel should have reviewed the tape before it was played to the jury;

2) He should have either made an in limine motion to exclude the entire tape as inadmissible heresay or moved to exclude it under Evidence Code section 352; 3) If certain parts of the tape were admissible as prior inconsistent statements of Mrs. Horton, counsel should have stopped the tape when the conversation with Mrs. Horton was over.

The tape was apparently offered to rebut testimony that the police had unreasonably harassed the Horton family. For example, in her testimony on cross-examination, Mrs. Horton had denied that Officer Larault encouraged her to talk to her husband's lawyer before answering his questions. And Horton stated several times in his testimony that the police had bothered his wife at work and harassed his whole family. In addition he had insinuated that the police had stolen property from his house during the warrant search. The taped material was relevant for rebuttal purposes, not only because it contained prior inconsistent statements of Mrs. Horton, but also because it tended to show that the tone of the officer's questioning was not intimidating and it explained why certain property had not been returned. Any prejudice occasioned by the officer's spontaneous statements about the law was slight and was further mitigated by the court's admonition that Larault's statements were not to be considered as evidence.

Horton claims that the bulk of the material on the tape was not relevant for any proper rebuttal purpose and was extremely prejudicial; consequently it would have been excluded had counsel raised an objection on those grounds under Evidence Code section 352. The

parts he finds most objectionable are the officer's references to the marijuana found in the house and his own statement that he did not intend to help the police tidy up a circumstantial case against him.

In regard to the mention of marijuana and scales taken from the house, previous testimony during the case in chief had established quite clearly that Horton's son was selling marijuana and that those items had been found in his room. Therefore this information could have very little added prejudicial effect. As to his comment that he did not want to help police tie up a case against him, this constituted an admission and was consequently admissible under Evidence Code section 1220 in any case.

In conclusion we agree that reasonably competent defense counsel would have previewed a tape recording in which a defense witness and defendant himself engaged in conversation with a police officer, and should have been prepared to interpose objections to its admission before it was played to the jury. The Attorney General argues that defense counsel here did in fact preview the tape and simply decided the material was relatively innocuous. We are unable to determine from the record whether counsel was aware of the contents of the tape or not. But it makes no difference, since we find that the taped material was admissible for purposes of impeachment and as an admission. As to the rest any prejudice was minimal, and the jury was duly admonished.

III. PROSECUTORIAL MISCONDUCT

Horton argues that the prosecutor engaged in a number of incidents of misconduct which prejudiced the

jury against him. In those instances where no objection was made, he argues that an objection followed by an admonition would not have cured the error. (*People v. Perez* (1962) 58 Cal.2d 229, 250.) In the alternative, if an admonition would have cured the error, he contends that counsel was ineffective in not raising the objection. In cases where counsel did object and an admonition was given, he argues that the prejudice was nonetheless not dispelled.

The first two instances involve evidence elicited at trial regarding marijuana in the Horton household and Horton's employment at a methadone clinic, the claim being that the prosecutor was deliberately trying to portray Horton and his family as drug addicts. The second two incidents occurred during closing argument and involve the prosecutor's use of Horton's tape recorded statements, and his characterization of Horton and the alibi witnesses as perjurers.

The Marijuana Evidence

This evidence came out in the following way. Horton's son Terry junior was called as a witness during the People's case in chief. In the course of establishing the ownership and location of the various guns in the house, he was questioned about events that took place the day Sergeant Larault executed the search warrant. On cross-examination, defense counsel asked him: "You were arrested by Sergeant Larault as an accomplice in this case, weren't you?" He answered "Yes, I was." He then testified that his hands were handcuffed behind his body, that Sgt. Larault's manner was intimidating, and that he was

kept in custody for at least a half an hour. On redirect, the prosecutor asked Terry if he wasn't in fact arrested for selling marijuana, to which he replied no. The prosecutor then showed him a photo taken from his room which Terry identified as a picture of himself holding a Thai stick. Further testimony revealed that marijuana and scales had been found in Terry's room. On recross, Terry stuck to his testimony that Sgt. Larault had arrested him as an accomplice. He denied that he had been selling marijuana.

When Sgt. Larault took the stand he described in some detail the evidence of marijuana found in Terry's room, including two "bricks" of marijuana. The judge interrupted this testimony to remind the jury that the evidence they were hearing was being received "solely on the issue of credibility of Samuel [Terry] Horton . . . with regard to his statement that he was arrest as an accomplice and not for the sale of marijuana." They jury was specifically admonished.

There followed testimony by the officer that Terry had been detained while the search proceeded and that police had thought initially he might be a possible co-defendant. When marijuana was found in Terry's room, he advised Terry per *Miranda,* at which point Terry informed him that he used marijuana and the whole family used it, and that he sold approximately $230 worth of marijuana a week to others.

During the defense case, it was eventually established that the "bricks" of marijuana Sgt. Larault described were firecrackers, not marijuana. On the other hand, Terry admitted on the stand that he and been

selling approximately $230 worth of marijuana a week. The prosecutor asked if his family knew about this and Terry answered "Yes" before an objection, which was sustained, could be interposed.

Horton contends that the prosecutor deliberately elicited inadmissible and prejudicial testimony regarding marijuana use and sale in the Horton household and that such a tactic amounts to prosecutorial misconduct. (*People v. Evans* (1952) 39 Cal.2d 242.) As the summary of testimony shows, however, evidence of Terry's involvement in marijuana sales was brought out only after Terry had testified that he had been arrested as an accomplice.

Horton points out that Officer Larault admitted he had initially detained Terry as a possible co-defendant; therefore his testimony in essence tended to corroborate, rather than refute, Terry's and the marijuana evidence was not necessary for any impeaching purpose. We disagree. Defense cross-examination of Terry left the impression that he had been intimidated by police and arrested for a crime he didn't commit. The prosecution was entitles to put on evidence tending to prove the contrary. The court so ruled and duly admonished the jury as to the limited use of the evidence. Evidence regarding the sale of $230 per week worth of marijuana was likewise admissible since Terry has specifically denied he was selling that amount or any amount of marijuana. In regard to the picture of Terry holding a Thai stick, that picture was stricken from evidence at counsel's request.

Because the marijuana evidence was introduced with the proper purpose of impeaching a witness' credibility, and was expressly limited to that purpose by the court's

admonishment, no prosecutorial misconduct occurred here. Horton argues nonetheless that reasonably competent defense counsel would have been aware of what was found in the house and would have made an in limine motion to keep out any evidence regarding marijuana use and sales in the household because of its highly prejudicial nature. Even had such a motion been made and granted, however, the evidence would have been admissible on the issue of Terry's credibility. Finally, the prejudice resulting from the introduction of the marijuana evidence reflected only indirectly upon Horton himself. We do not find it reasonably probable that a result more favorable to him would have occurred had this evidence been excluded. (*People v. Ledesma, supra,* 43 Cal.3d at pp. 215-218.)

Defendant's Employment at a Methadone Clinic

Evidence that Horton was working at a methadone clinic at the time of the robbery first came in during the D.A.'s direct examination of Terry junior as to the possible reasons why Horton possessed handcuffs. Later, during his cross-examination of Mrs. Horton, the prosecutor returned to this point. When Mrs. Horton described her husband as a county employee, he pressed her for the specific information: "Well, come on, Mrs. Horton, are you just – your husband worked for the methadone clinic, right?" Counsel immediately objected and the court declared a recess.

Out of the presence of the jury the prosecutor explained that the relevance of the question was to show

"we have heroin addicts." The judge sustained the objection and agreed to admonish the jury.

When court reconvened with the jury present, however, no admonishment was given. Horton argues that he was prejudiced by this incident because any knowledgable juror would conclude from the mention of the methadone that Horton had drug connections or was a heroin addict. We do not agree that these are necessarily commonly held assumptions. Moreover, when Horton took the stand he gave testimony regarding his employment. He had worked for the county of Santa Clara since 1971 as a mental health specialist. For approximately 13 months of his 15-year tenure with the county he had been assigned to Hillview Methadone Clinic. His duties there included setting up test sheets, collecting urine specimens and logging the results, and filling out Medi-Cal forms. We believe this testimony sufficiently rehabilitated Horton and diffused any taint cause by the prosecutor's reference to the methadone clinic.

Reference to Defendant's Prearrest Silence

In closing argument the prosecutor stressed the point that two months after the robbery when Horton was being questioned by Sergeant Larault, he offered no alibi, nor any alibi witnesses, the obvious implication being that his behavior was inconsistent with that of an innocent man. These were some of his comments: "You won't find the defendant crying of his innocence on that tape – in other words, I, I've got two different occasion[s], I just don't want to help you tie up a circumstantial evidence in this case either. [¶] At that point Sergeant Larault wasn't

leaning on them or being barbaric or anything saying I just want to talk to you. I just want to get some information. Perfect opportunity for them to give the information they would have given, should have given if in fact they had a decent alibi, but they don't."

Horton argues that these statements have a tendency to confuse the jury regarding the burden of proof by suggesting that the defendant must come forward to prove his innocence rather than the prosecution proving his guilt. He claims this is an impermissible comment on a defendant's right not to speak to police, and violates the rule expressed in *Griffin v. California* (1965) 380 U.S. 609.

As we have noted, Horton's statement that he didn't want to help the police tie up their case against him was admissible as an admission under Evidence Code section 1220. Moreover, where a defendant fails to speak, or makes an evasive or equivocal reply, under circumstances where a reasonable person would speak, his silence may be used against him as an implied or adoptive admission, unless he was relying on his Fifth Amendment right of silence. (Evid. Code, § 1221; *People v. Preston* (1973) 9 Cal.3d 308, 314.)

In *Jenkins v. Anderson* (1980) 447 U.S. 231, the defendant, accused of murder, claimed for the first time at trial that the killing had been in self-defense. The prosecutor cross-examined him about whether, prior to the arrest, he told police about the incident. The Supreme Court held that the Fifth Amendment is not violated by use of *prearrest* silence to impeach a criminal defendant's credibility. (*Id.* at p. 237.) Under similar circumstances in *People v. Free* (1982) 131 Cal.App.3d 155 the court followed *Jenkins*

in concluding that the California rule is that "[p]rearrest silence may be commented upon unless the court finds the silence was an invocation of Fifth Amendment rights." (*Id.* at p. 165.)

The conversation referred to here between Horton and Sergeant Larault took place well before his arrest and was not preceded by any *Miranda* warnings. On the other hand, it was clear that Horton was a suspect in the case since his house had been searched and he was being questioned about events on the day of the robbery. Furthermore, it appears that he was relying upon his constitutional rights when he told Larault he would answer further questions only in the presence of his attorney. In such a case it is improper to comment upon his silence. (*People v. Preston, supra,* 9 Cal.3d 308, 315.)

No objection was raised here regarding the prosecutor's remarks about Horton's prearrest silence. In fact defense counsel in his closing argument urged the jury to play the end of the taped conversation between Larault and Horton and listen to his client, when confronted by Sgt. Larault, volunteer to come to the police and talk. Clearly defense counsel felt that Horton's expressed willingness to talk was evidence of his innocence.

Because there was no objection, the question of prosecutorial misconduct was not preserved for appeal. (*People v. Baines* (1981) 30 Cal.3d 143, 149.) And the record shows that counsel's omission resulted from a tactical choice which we cannot say was outside "the range of reasonable competence." (*People v. Pope* (1979) 23 Cal.3d 412, 426.) Therefore, the claim of ineffective assistance of

counsel must also fail. (*People v. Ledesma, supra,* 43 Cal.3d at p 216.)

References to Perjury

In his closing argument the prosecutor characterized defense testimony as a "parade of perjury", repeating this phrase several times. And in his rebuttal remarks, after pointing out certain inconsistencies in the testimony of defense witnesses, he said this: "You don't like to think that people are actually going to lie to you, but it happens all the time in these walls in this building. If we prosecuted all the perjury that went on in criminal and civil trials –" Here he was interrupted by an objection. There followed a discussion at the bench, after which the court asked the prosecutor to rephrase his statement, explaining to the jury: "Lawyers are entitled to argue matters that are in evidence before the jury and matters that are common knowledge to the public at large and I suppose inferences that can be drawn by reason and logic from facts that are established in evidence." The prosecutor then resumed argument, explaining: "The problem I guess is the word "perjury". Maybe I better word it you have to decide who's telling you the truth or not. . . ."

Horton Directs us to several cases which have found that a prosecutor commits misconduct when he refers to the defense witnesses as perjurers. (*People v. Ellis* (1966) 65 Cal.2d 529; *People v. Reese* (1963) 220 Cal.App.2d 143, 146; *People v. Conover* (1966) 243 Cal.App.2d 38.) The *Reese* case stated the reason behind this rule: "A witness on the stand cannot be impeached by an accusation of perjury unless the witness has been convicted thereof, since

impeachment of this character stems from a prior conviction of a felony. An attorney should not be permitted to accomplish by argument that which he is precluded from doing by cross-examination." (*People v. Reese, supra,* at p. 147.)

The *Reese* court recognized, however, that not every instance where the word perjury is used will amount to misconduct. The district attorney prosecuting Reese, rather than pointing out discrepancies in the testimony of each witness and explaining to the jury how this indicated false testimony, which he had a perfect right to do, simply "branded defedant's (sic) witnesses as possible felons." (*Id.* at p. 147.) The critical distinction between permissible and impermissible argument is whether the prosecutor's comments are drawn from the evidence before the jury. (*People v. Ellis, supra,* 65 Cal.2d 529, 540.) "The words 'lie' and 'perjury' are the expressions commonly used to describe wilfully false testimony, and there is no reason why a prosecutor must resort to circumlocutions when discussing this distasteful but pertinent subject. . . .[¶] The test . . . is whether the argument was fairly based on the evidence." (*Peopl. v. Garrison* (1966) 246 Cal.App.2d 343, 352-354.)

In our case the prosecutor reviewed the testimony of the defense witnesses in considerable detail, pointing up discrepancies and inconsistencies, and asked the jury to apply common sense and logic to draw the conclusion that the alibi did not have "the ring of truth" about it. We do not believe that this argument could have raised in the jurors' minds the inference warned against in *Reese* that the witnesses were felons. In our view it makes no difference whether the prosecutor argued that the witnesses

deliberately lied or suggested that they had perjured themselves; an attack upon the testimony of these witnesses is fair comment upon the evidence. (*People v. Garrison, supra,* at p. 355.)

Even had the prosecutor's reference to the "parade of perjury" amounted to improper argument, any possible prejudice arising therefrom was cured by the admonition of the judge and the retraction by the prosecutor.

THE WRIT PETITION

Horton claims that the various instances where counsel fell short of professional standards, including his failure to object to incidents of prosecutorial overreaching, together had a cumulative effect which deprived him of a fair trial. (*People v. Hudson* (1981) 126 Cal.App.3d 733, 741.) He argues that because the outcome of the case depended on the jury's determination of the relative credibility of the prosecution and defense witnesses, evidence which presented Horton and his family to the jury as people with criminal tendencies could have tipped the balance. Finally he points out that the prosecutor was engaged in a deliberate strategy to portray the Hortons as drug addicts. Because counsel failed to keep out the prejudicial evidence, he argues, he was denied the assistance of a reasonably competent attorney.

We have addressed each of Horton's claims and have found each to be either harmless error or not error at all. We do not find that their cumulative effect is such as to warrant reversal. The evidence was not closely balanced

in this case. The victim, who was trained in voice identification and knew Horton personally, positively identified Horton's voice was that of the man who robbed him. Three weapons, two of them extremely uncommon, fitting his description of those used in the robbery were found in Horton's home. Handcuff keys were also found. An eyewitness who saw Horton fleeing the scene with what appeared to be a gun under his arm identified him from a photo lineup shortly after the robbery. Moreover, Horton knew the victim was the treasure of the coin club, knew the club was putting on a three day coin show, knew when the show ended, and could easily conclude that the victim would be returning home shortly thereafter with the receipts. In light of the overwhelming evidence of guilt, we find that appellant has failed to show that a determination more favorable to him would have resulted in the absence of the errors he claims. (*Strickland v. Washington, supra,* 446 U.S. at pp. 693-694.)

In his petition for a writ of habeas corpus, Horton has included two declarations by members of the defense bar who state their opinions that competent defense counsel would have acted to keep out evidence of Horton's prior conviction, all evidence on the tap recording, and all evidence regarding marijuana and methadone, and that they can conceive of no tactical reason for allowing this evidence before the jury. Also included is appellate counsel's declaration that trial counsel refused to talk to her about the case. Even if counsel's representation in certain instances fell below an objective standard of reasonableness under prevailing professional norms, no miscarriage of justice has been shown, as we have discussed

above. The writ petition therefore does not add anything of susbtance (sic).

IV. SENTENCING ERROR

Horton was sentenced to the upper term of six years for the robbery, and a consecutive term of eight moths for possession of a concealable firearm by an ex-felon (Count III). His sentence was enhanced by two years under Penal Code section 12022.5, subdivision (a) for use of a firearm in the commission of a felony. He makes two claims regarding his sentence: 1) the judge used the same fact to impose the aggravated term and the enhancement; and 2) the judge failed to state his reasons for imposing the eight-month consecutive sentence for Count III. There was no dual use of a fact and the failure to state reasons was harmless error, not requiring remand.

Dual Use of a Fact.

Horton contends that the court considered the use of the Uzi during the robbery as a factor both to impose the aggravated term and to enhance his sentence under Penal Code section 12022.5, subdivision (a). If so, the sentence violated California Rules of Court, rule 441(c). (*People* v. *Arbee* (1983) 143 Cal.App.3d 351, 356.)

The judge stated his reasons for imposing the sentence as follows: "I find this a particularly vicious crime, and I have no doubt in my mind that Mr. Horton is guilty of this and he involved others and that he found others establishing an alibi which I believe also was contrived. It's also established by the type of weapon that's used

and the severe force in using that stun gun repeatedly on his back, victim's back, which amounted to torture of the victim.

"All in all it is an aggravated case and I intend to impose the aggravated punishment, and he's got prior convictions, he's been to prison, to the case. I see nothing to mitigate the case at all. And the type of weapon that was involved possessed by an ex-convict is a status all by itself and doesn't come under section 654. So it's my intent to impose an eight year eight month term in this case."

The usual circumstances in aggravation and mitigation are set forth in California Rules of Court, rules 421 and 423. The judge articulated four factors in aggravation: 1) the crime involved a high degree of cruelty, viciousness or callousness (rule 421(a)(1)); 2) the defendant involved others in the crime (rule 421(a)(5)); 3) he suffered prior convictions of increasing seriousness (rule 421(b)(2)); and he had served a prior prison term (rule 421(b)(3)). He found no factors in mitigation.

Horton mistakenly understood the judge to refer to the Uzi as an aggravating factor. We agree with the Attorney General that the judge referred to the "type of weapon" twice to describe two different weapons. In the first case he was referring to the stun gun to explain his finding that the crime involved a high degree of cruelty. In the second instance, the reference was to the Uzi to explain that possession of that weapon is a crime in itself under Penal Code section 12021, subdivision (a) and thus did not fall within the proscription against double punishment contained in Penal Code section 654.

There was no dual use of facts.

Failure to State Reasons

The Attorney General concedes that the judge did not state separate reasons for imposing a consecutive sentence for Count III (Pen. Code, § 1170, subd. (c)), but argues that the error was harmless because it is not reasonably probable that Horton would obtain a more favorable sentence on remand. (*People* v. *Avalos* (1984) 37 Cal.3d 216, 233.) We agree.

California Rules of Court, rule 425 provides that factors supporting imposition of consecutive sentences may include any circumstances in aggravation under rule 421. In this case there were four valid aggravating circumstances, any one of which is sufficient to authorize imposition of the upper term. (*People* v. *Burney* (1981) 114 Cal. App.3d 497, 505.) The remaining three aggravating factors cited by the court are available to support the imposition of a consecutive sentence.

The judge's comments made clear that he found Horton's crime to be a particularly vicious one, warranting aggravated punishment. In light of this, remand for resentencing would be an exercise in futility, since the trial court would simply restate the various factors and impose the same sentence.

DISPOSITION

The judgment is affirmed and the petition for writ of habeas corpus is denied.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

6th District, No. H002749

S008612

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

PEOPLE
v.
TERRY HORTON

Appellant's petition for review DENIED.

/s/ LUCAS
Chief Justice

Dated: March 15, 1989

SUPREME COURT OF THE UNITED STATES

No. 88-7164

Terry Brice Horton,
Petitioner

v.

California

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeal of California, Sixth Appellate District.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 10, 1989

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
NOV 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-7164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TERRY BRICE HORTON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The California Court Of Appeal For The Sixth Appellate District

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

In order to seize evidence not listed in the search warrant, must the evidence be inadvertently discovered?

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OPINION BELOW

The opinion of the California Court of Appeal for the Sixth Appellate District (Pet. App. A, pp. 1a-36a) is not reported.

JURISDICTION

The opinion of the California Court of Appeal was filed on November 30, 1988. A petition for review was denied by the California Supreme Court on March 15, 1989 (Pet. App. B, p. 87a). The petition for writ of certiorari was filed on May 6, 1989, and was granted on October 10, 1989. The jurisdiction of this Court rests upon 28 U.S.C. 1257 (3).

STATEMENT

On January 13, 1985, Erwin Paul Wallaker transported funds and collector's coins from a coin show to his home (R. 57-59). As he walked to the rear of his garage, he was surprised by a masked individual with a gun (R. 80). Shortly thereafter, another person appeared. After being thrown to the ground, Mr. Wallaker was shocked with an electrical device (R. 86-88). Three rings and two wallets were taken from him (R. 91), and jewelry was taken from a safe (R. 101).

Two young men and a woman were walking by the garage when they observed a man walk by quickly, carrying an object resembling an umbrella (R. 175-76). They then noticed an open garage door from which they heard someone yelling for help. Inside the garage, they found Mr. Wallaker handcuffed and gagged (R. 180).

When the police arrived, Mr. Wallaker gave a description of the two suspects. He stated that one of the assailants had a machine gun with a round magazine, that he had been shocked by an electrical prod, and that he had seen the butt of a blue-steel revolver (R. 241-42). At that

time, he also informed the officers that one suspect had a southern accent, but that he was unable to identify the individual (R. 248). The following day, Mr. Wallaker informed a police officer that, during the night, he recognized the voice of one of the assailants as that of petitioner, Terry Brice Horton (R. 263).

An affidavit for a search warrant for the home of Mr. Horton was prepared and presented to a magistrate on January 28, 1985 (J.A. 4). The crime report and a supplemental offense report regarding the Wallaker incident were incorporated in the affidavit (J.A. 3). The officer requested the issuance of a search warrant allowing the seizure of the articles taken during the robbery of Mr. Wallaker. In the affidavit, the officer stated that based on his experience as a robbery investigator, he "concluded that robbers take the property stolen from their victims to the robbers' place of residence" (J.A. 2-3). A warrant was issued to search Mr. Horton's home for the proceeds of the robbery (J.A. 13-14).

The search warrant was executed on January 30, 1985 (J.A. 27). The officer testified that he intended to search for "some type of mask that covers one's head; . . . gloves; . . . weapon(s); some kind of device that would produce a shock or burning sensation; handcuffs . . . or keys for the handcuffs; . . . some evidence of the San Jose Coin Show and to find out if in fact Mr. Horton was at the coin show" (J.A. 22-23), none of which was particularly described in the warrant. None of the items listed in the warrant was seized (R. 272), but the officers did seize an Uzi gun, a revolver, a handgun, two stun-guns, two handcuff keys, a jacket belonging to Mr. Horton, and a jacket belonging to Mr. Horton's wife (J.A. 28-31).

At the conclusion of a preliminary examination heard on August 23, 1985, in the California Municipal Court,

Santa Clara County Judicial District, Mr. Horton objected to the introduction of the evidence not listed in the warrant which was seized. The magistrate granted Mr. Horton's motion (J.A. 42). Mr. Horton was held to answer the charges in the Superior Court (C.T. 176).

An information was filed in the Santa Clara County Superior Court on August 23, 1985, alleging that Mr. Horton had violated California Penal Code sections 211-213.5 (robbery in a residence), 237 (false imprisonment), 12021(a) (possession of a concealable firearm by a felon), and 12020(a) (possession of an illegal firearm), and alleging as an enhancement personal use of a firearm in violation of Penal Code sections 12022.5 and 1203.06 (C.T. 207-08).

On September 23, 1985, the prosecution's motion pursuant to California Penal Code section 1538.5 requesting an order reversing the decision of the magistrate suppressing the evidence was heard and granted (J.A. 26-42).

Jury trial commenced on October 7, 1985. Guilty verdicts were returned on all counts on October 20, 1985 (C.T. 362-63). On November 17, 1986, Mr. Horton was sentenced to state prison for a term of eight years and eight months (C.T. 431).

On November 18, 1986, Mr. Horton filed a notice of appeal of the judgment. Following briefing and oral argument, the California Court of Appeal for the Sixth District filed its decision on November 30, 1988, affirming the judgment of conviction. As to the issue addressed herein, the California Appellate Court concluded that the portion of *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), which dealt with the inadvertence requirement of the plain view doctrine was signed by only four members of the United States Supreme Court and hence was not actually

decided, and thus has no precedential effect on this point (J.A. 52-53).

On March 15, 1989, the California Supreme Court denied Mr. Horton's petition for review (J.A. 78).

SUMMARY OF ARGUMENT

The fourth amendment requires a warrant issued upon probable cause, particularly describing the place to be searched and the persons or things to be seized. Seizures conducted without benefit of a warrant issued upon probable cause and particularly describing the items to be seized are "*per se* unreasonable" unless one of the exceptions to the warrant requirement is applicable. *United States* v. *Place*, 462 U.S. 696, 701 (1983). While there exist exceptions to this warrant requirement, the Court has emphasized that these exceptions are "few," "specifically established," and "well-delineated." *Katz* v. *United States*, 389 U.S. 347, 357 (1967). If the warrant requirement "is to be a true guide to constitutional police action, rather than just a pious phrase, then '[t]he exceptions cannot be enthroned into the rule.'" *Coolidge* v. *New Hampshire*, 403 U.S. at 482 (citation omitted).

One of the exceptions to the warrant requirement is the seizure of evidence in "plain view." In *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. 443, this Court addressed the problem of identifying "the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal." *Id.* at 466. The plurality opinion of *Coolidge*, as it pertains to the instant case, holds that where "the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police knew of its location and intended to seize it, then there is a violation of the express constitutional requirement of '[w]arrants . . . particularly describing . . . [the] things to be seized.'" *Id.* at 472.

The California Court of Appeal, Sixth Appellate District, declined to apply the inadvertence requirement as articulated in *Coolidge*, pointing out that plurality opinions are not binding authority on the states (J.A. 52-53). However, almost all of the states have followed the *Coolidge* inadvertence requirement. See, e.g., *Clark* v. *State*, 498 N.E.2d 918 (Ind. 1986); *State* v. *Oliver*, 34 N.W.ed 744 (Iowa 1983); *Commonwealth* v. *Cefalo*, 381 Mass. 319, 409 N.E. 719 (1980); *State* v. *Bruzzese*, 94 N.J. 210, 463 A.2d 320 (1983); *State* v. *Galloway*, 232 Kan. 87, 652 P.2d 673 (1982).

Allowing the seizure of property not listed in a warrant, not inadvertently found, would seriously undermine the warrant requirement.

> This is simply a corollary of the familiar principle that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.

Coolidge v. *New Hampshire*, 403 U.S. at 468.

Requiring inadvertence prevents police officers from presenting information to a magistrate for the issuance of a search warrant establishing probable cause only for the seizure of one item with the intention of searching for and seizing items not in the warrant. This requirement prevents planned warrantless seizures. Instead of magistrate determined probable cause to seize particular items,

without the inadvertence requirement, items will be seized at the discretion of police officers.

If this Court were to allow the seizure of evidence not particularly described in a warrant, which was in plain view but not seized inadvertently, the requirement that "no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly the place to be searched, and the persons or things to be seized," will be "just a pious phrase." *Coolidge*, 403 U.S. at 482. As stated by Justice Harlan in his concurring opinion: "A contrary result in this case would, I fear, go far toward relegating the warrant requirement of the Fourth Amendment to a position of little consequence in federal search and seizure law, . . ." *Id.* at 493.

ARGUMENT

I. IN ORDER FOR THE PLAIN VIEW EXCEPTION TO THE WARRANT REQUIREMENT TO APPLY, THE DISCOVERY OF THE EVIDENCE MUST BE INADVERTENT

The fourth amendment guarantees:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Seizures conducted without benefit of a warrant issued upon probable cause and particularly describing the items to be seized are "*per se* unreasonable" unless one of the exceptions to the warrant requirement is applicable. *United States* v. *Place*, 462 U.S. 696, 701 (1983). While there exist exceptions to this warrant requirement, the Court has emphasized that these exceptions are "few,"

"specifically established," and "well-delineated." *Katz* v. *United States*, 389 U.S. 347, 357 (1967).

The few exceptions to the warrant requirement provide for those cases where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate. But because each exception to the warrant requirement invariably impinges to some extent on the protective purpose of the fourth amendment, the few situations in which a search may be conducted in the absence of a warrant have been carefully delineated, and the burden is on those seeking the exception to show the need for it. *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979).

Recognizing the importance of the warrant requirement, this Court has limited the scope of the exceptions to the rule. For example, in *Chimel* v. *California*, 395 U.S. 752 (1969), this Court limited the scope of the search incident to arrest exception. In *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. 443, this Court limited the scope of the "plain view" exception.

It is well established that under certain circumstances the police may seize evidence in plain view without a warrant.

> But it is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the plain view doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal.

Coolidge v. *New Hampshire*, 403 U.S. at 466.

Plain view alone is never enough to justify the warrantless seizure of evidence. *Coolidge* holds that to justify seizure of evidence in plain view: (1) the officer must be in a place where he has a right to be; (2) the discovery must be inadvertent; and (3) it must be immediately apparent that the object is evidence of a crime. *Id.* at 468-70. This petition addresses the inadvertence requirement.

A plurality opinion of this Court is not binding authority on state courts, a fact pointed out by the California Supreme Court in *North* v. *Superior Court*, 8 Cal. 3d 301 (1972) and the California Court of Appeal in its decision affirming the judgment in the instant case.[1] However, in *Texas* v. *Brown*, 460 U.S. 730 (1983), Justice Rehnquist, writing for four Members of the Court, stated: "While not a binding precedent, as the considered opinion of four Members of this Court, it should obviously be the point of reference for further discussions of the issue." *Id.* at 738.[2] In a concurring opinion in *Texas* v. *Brown*, Justice Powell, with whom Justice Blackmun joined, saw "no reason at this late date to imply criticism of [the *Coolidge*] articulation of this exception [because] [i]t has been accepted generally for over a decade." *Id.* at 747. The remaining three justices, without addressing this point, cited *Coolidge* as a precedent on the plain view doctrine.

[1] Justice Harlan did not concur in Part II-C of Justice Stewart's opinion, but did concur in Part II-D of the opinion, which was a response to the criticisms of the "inadvertence requirement" contained in Part II-C of the opinion. Thus, there is a question as to whether the *Coolidge* opinion is actually a plurality opinion.

[2] This statement was reiterated by Justice O'Connor in a dissenting opinion in *Arizona* v. *Hicks*, 480 U.S. 321 (1987).

In fact, most courts have accepted the "inadvertent discovery" limitation as the law of the land.[3]

There are two distinct plain view situations in which the inadvertence requirement applies. First there is the situation where the police are in a place where they have a right to be, but without a search warrant, such as hot pursuit or search incident to lawful arrest. The second situation, presented in instant case, is where a search is conducted pursuant to a warrant, but items not particularly described are seized.

In order for evidence in plain view to be seized, it must have been discovered inadvertently. Where the officers are present to execute a search warrant and seize items not particularly described, it must be shown that the officers had no intention of searching for and seizing those items. The police may not plan a "plain view."

In order for discovery to be inadvertent, the discovery must have been unintentional. In *United States* v. *Hare*, 589 F.2d 1291 (6th Cir., 1979), the United States Court of Appeal, Sixth Circuit, stated:

> A search must be limited to the scope of the warrant, and the police officer must intend to search for the items specified therein; but if, in the course of such a properly limited search, the officer comes across

[3] See, e.g., *Ludlow* v. *State*, 262 Ind. 266, 314 N.E.2d 756 (1974); *Terry* v. *State*, 271 Ark. 715, 610 S.W.2d 272 (1981); *State* v. *Galloway*, 232 Kan. 87, 652 P.2d 673 (1982); *State* v. *VanBeek*, 88 S.D. 1954, 216 N.W.2d 561 (1974); *State* v. *Johnson*, 17 Wash. App. 153, 561 P.2d 701 (1977); *State* v. *McColgan*, 631 S.W.2d 151 (Tenn. 1981); *State* v. *Sanders*, 431 So. 2d 1034 (Fla. App. 1983); *Tucker* v. *State*, 620 P.2d 1314 (Okla. Cr. 1980); *State* v. *Dingle*, 279 S.C. 278, 306 S.E.2d 223 (1983).

> other incriminating evidence, which he did not *know* he would find and thus did not intend to seize, its discovery is inadvertent.

Id. at 1294. The *Hare* decision holds that if the police had probable cause to believe they would fine the evidence or contraband before making the seizure, and had an opportunity to obtain a warrant, any exigency which results of their own making cannot serve as grounds for a warrantless seizure. Inadvertence means that the police must be without probable cause to believe evidence would be discovered until they actually observe it in the course of an otherwise justified search (*ibid.*).

The seizure in the instant case was not inadvertent. The magistrate was presented information only for a determination as to whether probable cause existed for the seizure of the proceeds of the robbery. Thus, the warrant particularly described only the items taken during the robbery to be seized. However, at the time the police officers requested the warrant and when the warrant was issued and executed, the police officers intended to search for items not particularly described in the warrant. The officer was looking for "items that would connect the person at the home to associate with the robbery, things used in the robbery to obtain the property, weapons mentioned in the police reports, the clothing described by the witnesses and the victims in the police report" (J.A. 28). Only items not particularly described were seized. Thus, there was no probable cause determination made by a magistrate for any items seized.

II. THE INADVERTENCE REQUIREMENT IS NECESSARY TO PROTECT THE SECOND CLAUSE OF THE FOURTH AMENDMENT

The fourth "amendment's proscription of 'unreasonable searches and seizures' must be read in light of 'the history

that gave rise to the words'—a history of 'abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution . . .'" *Chimel* v. *California*, 395 U.S. at 760-61. The fourth amendment was written into the Constitution because "sad experience had taught [the colonialists] that the right to search and seizure should not be left to the mere discretion of the police, but should as a matter of principle be subjected to the requirement of previous judicial sanction wherever possible." *Trupiano* v. *United States*, 334 U.S. 699 (1948).

The prominent place the warrant requirement is given in this Court's decisions reflects the basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government. *United States* v. *United States District Court*, 407 U.S. 297, 317 (1972). The rule requiring a warrant for search and seizure rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. By requiring that conclusions concerning probable cause and the scope of a search be drawn by a neutral and detached magistrate instead of being judged by the officer, the court minimizes the risk of unreasonable assertions of executive authority. *Arkansas* v. *Sanders*, 442 U.S. at 759.

> The point of the fourth amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a

> magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

Johnson v. *United States*, 333 U.S. 10, 13-14 (1948).

The decisions of this Court concerning the requirements before a warrant can issue require that a judicial officer issuing the warrant be supplied with sufficient information to support an independent judgment that probable cause exists.

> Under the cases of this Court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. (Citation.) A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless.

Whiteley v. *Warden*, 401 U.S. 560, 566 n. 8 (1971).

The language of the fourth amendment is not ambiguous. It very clearly states that the warrant shall "particularly describ[e] . . . the . . . things to be seized." The requirement that the items to be seized be included in the warrant has not been interpreted into the fourth amendment. It has been there since its birth.

The fourth amendment affords protection against both unreasonable searches and unreasonable seizures. The definition of reasonableness turns, at least in part, on the specific commands of the second clause of the amendment. Allowing officers to first conduct searches and seize evidence without a warrant and then have a court determine if the action was reasonable overlooks the second clause of the amendment. *United States* v. *United States District Court*, 407 U.S. at 316.

An affidavit must, in order to establish probable cause, contain enough information for the issuing magistrate to determine that the items sought are related to the criminal activity under investigation, *and* that they may reasonably be expected to be located in the place to be searched at the time when the search is authorized to be conducted. The conclusion that the items will be found in the place to be searched must be supported by substantial evidence. *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 557 (1978).

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant. *Marron* v. *United States*, 275 U.S. 192, 196 (1927). Warrants cannot authorize police officers to exercise undirected discretion in determining what to seize. *Berger* v. *New York*, 388 U.S. 41, 58 (1967).

The motivating concerns in Justice Stewart's treatment of the plain view issue in *Coolidge* is the strong preference for searches and seizures conducted with warrants. Without the inadvertence requirement, the fourth amendment's goals of encouraging police resort to the warrant process and limiting authorized intrusions to the smallest extent possible would be subverted.

Coolidge condemns seizures ostensibly made under the plain view doctrine when the police could have, but failed to, obtain a warrant for that seizure. The only reason plain view seizures are permitted at all is because the intrusion which the fourth amendment seeks to guard against has already lawfully occurred, and the police are faced with a situation in which they observe evidence which they could

not have obtained the permission to seize and which now is likely to disappear or be destroyed if they leave to obtain a new warrant. This is the exigency which underlies the plain view doctrine, and without this exigency the entire rationale falls. Police cannot create their own exigency by simply failing to obtain a warrant for a seizure until they are faced with the evidence. *United States* v. *Hare*, 589 F.2d at 1295.

If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know of its location and intend to seize it, there is a violation of the constitutional requirement. *Coolidge* v. *New Hampshire*, 430 U.S. at 471. In *United States* v. *Leon*, 468 U.S. 897, 918 n. 19 (1984), the Court specifically noted: "Our discussion of the deterrent effect of excluding evidence obtained in reasonable reliance on the subsequently invalidated warrant assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant." In so limiting the suppression remedy, the Court left untouched the various requirements for a valid warrant and the *Coolidge* limitations to the plain view doctrine.

"In any event we cannot forgive the requirements of the Fourth Amendment in the name of law enforcement." *Berger* v. *New York*, 388 U.S. at 62. The warrant requirement

> is not an inconvenience to be somehow "weighed" against the claims of the police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly overzealous, executive officers" who are a part of any system of law enforcement. If it is to be a true guide to constitutional police action, rather than just a pious phrase, then "[t]he exceptions cannot be enthroned into the rule."

Coolidge, 403 U.S. at 482 (citation omitted).

"The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual." *Sgro* v. *United States*, 287 U.S. 206, 210 (1932).

In order to prevent planned, warrantless seizures, the inadvertence requirement of *Coolidge* necessitates a showing that the officers had no intention of searching for and seizing a particular item not listed in the warrant. Where the officers presented no information to a magistrate upon which a probable cause determination could be made for the seizure of the item and the item was thus not listed in the warrant, to be seized it must be discovered inadvertently. Where officers seize evidence not particularly described in a warrant, the inadvertence rule requires invalidation of discoveries when police have an expectation that evidence will be discovered on the premises but fail to provide information in an affidavit for a magistrate made determination of probable cause for the seizure of that item.

The protections guaranteed by the fourth amendment should not be bypassed by the neglect of police officers to provide information in the affidavit establishing probable cause for the seizure of all evidence to be seized and listing in the warrant all evidence to be seized.

In the instant case, there was no reason for not obtaining a warrant for the items the police in fact seized. Inconvenience to the police officers and some slight delay necessary to prepare adequate papers and present them

to the magistrate are never convincing reasons to bypass the warrant requirement. *Trupiano*, 334 U.S. at 706.

Mr. Horton respectfully requests that this Court take seriously that an officer's authority be limited by the warrant he holds. The magistrate was given information establishing probable cause only for the search and seizure of the proceeds of the robbery. The warrant in no uncertain terms authorized only the seizure of the proceeds of the robbery. However, the police officers entered Mr. Horton's residence with the intention of searching for items not listed in the warrant. The officers seized only items not covered by the warrant, exceeding their authority granted by the warrant. This is tantamount to not obtaining a warrant at all. The search and seizure were not inadvertent. The bypassing of the warrant requirement should not be excused.

CONCLUSION

The judgment of the court of appeal, insofar as it affirmed the judgment against Mr. Horton, should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

In The Court Of Appeal Of The State Of California

SIXTH APPELLATE DISTRICT

No. H002749

Santa Clara County
Sup. Ct. No. 101741

No. H004177

THE PEOPLE, *Plaintiff and Respondent*,

v.

TERRY HORTON, *Defendant and Appellant*.

In Re TERRY HORTON on Habeas Corpus.

FILED FEB 14, 1983

Appellant Terry Horton was charged with residential robbery (Pen. Code, §§ 211-213.5), false imprisonment (§§ 236-247), possession of a concealable firearm by an ex-felon (§ 12021, subd. (a)) and possession of a short barrelled Uzi machine gun (§ 12020, subd. (a)). A jury found him guilty on all

counts and found the allegation true that he had personally used the Uzi in the commission of the offenses charged in counts I and II. He was sentenced to eight years eight months in state prison. He appeals the judgment of conviction, raising these contentions:

1. Property was illegally seized from his home;
2. He received ineffective assistance of counsel;
3. There was prosecutorial misconduct; and
4. He was improperly sentenced.

In connection with the second of these contentions Horton has filed a petition for a writ of habeas corpus. We will consider the writ petition in our discussion of issues involving ineffective assistance of counsel.

We affirm the judgment of conviction and deny the writ petition.

FACTUAL BACKGROUND

-The Robbery

Erwin Paul Wallaker (Wallaker) was the treasurer of the San Jose Coin Club. His duties included collecting the revenues generated by the club's annual coin show. In 1985 the show was held on January 11, 12 and 13 at the San Jose Convention Center. At the end of the third day, a Sunday, Wallaker left the convention center with approximately $10,000 in cash and currency in one briefcase, approximately $20,000 in collector coins of his own in another briefcase and approximately $1,200 on his person. He placed the briefcases in the trunk of his car.

Wallaker proceeded directly home, arriving around 6:30 p.m. He backed his car into the driveway, activated the garage door opener, and entered the garage on foot. Toward the rear of the garage he was surprised by two men wearing Halloween masks which covered their heads. One held a machine gun and the other a "stunning" device. The first man demanded money

while the second administered a series of shocks with the stun gun. Wallaker was eventually forced to the floor and handcuffed. He nonetheless attempted to keep the two men talking, because he had noticed that the first one had a strong southern accent which sounded familiar to him. This man was of medium height and build. Both men wore dark clothes.

The second assailant removed three rings Wallaker was wearing and took his billfold and credit card case while the first held the machine gun on him at close range. Wallaker's feet were bound and he was hogtied, gagged and partially blindfolded.

The man with the machine gun wanted to know where the rest of the money was. Wallaker pointed out a safe in the garage and one of the men removed the contents, consisting of several rings belonging to Wallaker's wife, some uncut rubies and a wristwatch. At some point the man with the stun gun produced a blue-steel short-barreled revolver. He rubbed it up against Wallaker's face, shone the flashlight on it and threatened to use it.

The robbers demanded the car keys and eventually located them where Wallaker had tossed them. Wallaker heard the car door open and close, which prompted him to renew his efforts to make noise in the hopes of attracting help. This precipitated further threats from one of the assailants who returned to the garage, hit Wallaker over the head, and dragged him back further from the garage door. Wallaker heard the car door open and close again and then silence.

He wriggled toward the front of the garage, yelling for help, and was able to attract the attention of three passersby. These three people came to his aid and called the police. The robbers had run off.

The police arrived at approximately 7:00 p.m. Wallaker gave a statement and then was taken to emergency where he received several stitches on the back of his head.

The three rescuers also gave statements. Lisa Miller, James Burwell and Jeff Beaulieu were walking along the street where Wallaker lived when a man rushed past them coming from the direction of Wallaker's house. The man was walking hurriedly, hunched over with his head down. He was of medium build and had longish gray-white hair. He was carrying something under his right arm which Miller thought was a gun and the others thought might be an umbrella.

The Search Of Defendant's House

Sometime in the early hours of the morning after the robbery, Wallaker realized that he recognized the voice of the man with the southern accent as that of Terry Horton. Wallaker knew Horton as a fellow coin collector. He had seen Horton at various coin club meetings over the course of approximately five years and the two had spoken to each other on perhaps two dozens occasions. He had recently talked with Horton at a meeting approximately three weeks prior to the robbery. And he had noticed Horton in attendance at the coin show on the Sunday of the robbery.

Wallaker contacted the police with this information the morning after the robbery. He met with Sergeant Gary Larault and made a positive ID of Horton from a mug shot. Larault then prepared a photo lineup and contacted Miller, Burwell and Beaulieu. Lisa Miller identified a picture of Horton as the man she had seen that night. The other two were not able to make an identification.

On January 28, 1985, a search warrant issued, authorizing the search of Horton's house for articles taken in the robbery. The eight-page police report of the crime was appended to the affidavit supporting the search warrant.

The Horton house was searched January 30, 1985. An Uzi machine gun, with a long and a short barrel and loaded clips, and a loaded blue-steel .38 caliber revolver were found in the master bedroom. On a bookshelf in the dining room were two Nova XR 5000 stun guns in operating condition. A set of

handcuff keys, an announcement advertising the San Jose Coin Club show, and some clothes were also removed. None of the items stolen from Wallaker's person or from his garage safe was recovered from the house; nor were any Halloween masks found.

Horton surrendered himself on June 10, 1985, after a warrant issued for his arrest.

Witnesses For The Prosecution

Wallaker testified that the Uzi machine gun, the blue-steel .38 revolver and the Nova stun gun appeared to be the weapons used against him during the burglary.

Wallaker was an ex-Air Force pilot. As a pilot he had been trained in voice identification. He had a practiced ear and was used to listening carefully to people's voices. He was 100 percent certain that the voice of the man who robbed him was Horton's.

The stun gun had produced numerous red welts on Wallaker's back. James Scroggins, an expert on stun guns, testified that the only stun gun on the market in January of 1985 which would have caused the effects described by Wallaker was the Nova XR 5000.

Wallaker testified that when he had seen Horton several weeks before the robbery, at a coin meeting, Horton had shoulder length gray hair. He also thought Horton's hair was gray when he glimpsed Horton at the coin show on the day of the robbery. Officer Larault testified that when Horton surrendered himself on June 10, 1985, he took Horton's picture. That picture was admitted into evidence and showed Horton with shoulder length gray hair.

Lisa Miller and James Burwell testified that the man they saw hurrying from the direction of Wallaker's house the evening of the robbery had collar or shoulder length gray hair, and a medium build. Miller testified that at the time she picked Horton's picture from the photo lineup shortly after the rob-

bery, she was "pretty certain" that was the man she had seen. At trial she was unable to say whether Horton was the man she had seen that night or not.

The Defense

Horton's defense was an alibi. He testified that at the time of the robbery he was at home watching TV and playing cards. His wife, his son, his daughter and two friends corroborated this testimony.

Horton, his wife, and his daughter Cathy all give substantially the same account of events on January 13, 1985.

Around noon they went to the coin show, together with Cathy's boyfriend Jim Nash. They stayed until approximately 3:30 p.m. and then returned home. Jim and Cathy went out to get pizza and the four ate dinner together and then played cards. Two friends of the family, Vernon Burgess and Joe DeAngelo, dropped by and Horton's son Terry came home during a break from work. All of these witnesses remembered that "60 Minutes" came on the TV while they were at Horton house because Horton and Jim Nash argued about whether to watch it or not. That show starts at 7:00 p.m.

Terry Jr. was at work that night. He punched out at 6:46 p.m. and went home to feed his puppy. He arrived home shortly before 7:00 p.m. and found the others there playing cards with the TV on. Terry's friend Joe DeAngelo dropped by at about the same time. Vernon Burgess testified that he came by the Horton's that night around 6:30 to borrow money to go to his father's funeral. Horton loaned him the money and he stayed the whole evening.

The defense stressed that Horton's hair had not been long and gray at the time of the robbery. Various witnesses testified that Mrs. Horton had applied a rinse to Horton's hair in late December which had turned his normally white hair to a blond-brown with red highlights. Burgess remembered this in particular because Mrs. Horton had done the same rinse on his

hair at the same time and it was too red. San Jose coin dealer Sheldon Wirt testified that he talked with Horton briefly at the coin show on Sunday and that Horton's hair was a reddish-orange color on that day. Finally, Horton's brother John testified that Horton's hair was brownish-blond and somewhat short in January of 1985. He remembered because it was such a contrast from the previous month when his hair had been white on the occasion of his son's wedding. Horton testified that his hair had been silvery-white for his son's wedding in December of 1984. Shortly thereafter his wife had given his hair a red rinse. By June, when he surrendered himself to the police, the rinse had washed out and his hair color had returned to its natural gray-white.

There was evidence that Horton was an avid gun collector and that various family members enjoyed target shooting at the rifle range. Cathy Horton testified that her dad had given her the .38 for her protection when she had lived away from home. The stun gun was also for her protection, since she came home late from a night class at San Jose State. Mrs. Horton owned several guns. She testified that Horton had given her the Uzi and that it was a collector's item. Horton's brother John testified that he and his brother had each bought stun guns for use by female family members.

Horton took the stand and recounted the events of January 13, 1985, as we have summarized above. He denied any involvement in the crime. He stated that he had not seen Wallaker at any coin club meeting in December of 1984. He knew Wallaker and testified that he had noticed him at the January coin show. He described two incidents involving Wallaker, both of which occurred in 1975 or 1976. Horton's 10-year-old daughter had bought some coins from Wallaker which Horton felt were overpriced and overgraded. He argued with Wallaker and threatened to inform the president of the club if Wallaker did not buy back the coins. Eventually Wallaker refunded his daughter's money. The second incident occurred at another coin show. Wallaker was talking to several people and Horton attempted to interrupt him to ask a question. Wallaker ignored him and

Horton made a disparaging remark, at which Wallaker took offense. Horton surmised that Wallaker was implicating him in the robbery because of bad feelings stemming from these incidents.

Defense introduced a brochure from the coin show, with the purpose of demonstrating that anyone attending that show could have "cased" Wallaker for a later robbery. The brochure listed the officers of the sponsoring San Jose Coin Club, including Wallaker as treasurer, and also showed a layout of the floor, indicating where each dealer's table was. Wallaker's table was identified on this diagram.

DISCUSSION

I. SEIZURE OF EVIDENCE DURING THE WARRANT SEARCH

At the conclusion of the preliminary hearing defense moved to suppress all evidence seized during the warrant search on the ground that the warrant authorized a search only for those items stolen during the robbery. The magistrate granted the motion to suppress and held Horton to answer. The information was filed in superior court, after which the People moved to reverse the magistrate's order. A hearing was held on September 23, 1985, and the superior court granted the People's motion.

The search warrant instructs the finder to search Horton's house for "the items described and sketched on the attached 'San Jose Police Department Property Report'". This report describes only the three rings Wallaker was wearing and the ring, watch and rubies taken from the safe.

Horton's argument is two-fold: Seizure of evidence not listed in the search warrant cannot be justified under the so-called "plain view" doctrine because discovery of these items was not "inadvertent"; and the police officers could not show a sufficient connection between the items seized and criminal activity.

The Inadvertence Requirement

Horton relies primarily upon *Coolidge* v. *New Hampshire* (1971) 403 U.S. 443 in arguing that items not listed in the warrant may be seized only if discovered inadvertently. He contends that the police in this case expected to find weapons in his home and intended to seize them.

The California Supreme Court, in *North* v. *Superior Court* (1972) 8 Cal.3d 301, observed that the portion of the *Coolidge* opinion which proposed this restriction of the plain view doctrine was signed by only four members of the court, with four expressly disagreeing. Hence the issue was not actually decided and *Coolidge* has no precedential effect on this point. (*Id.* at pp. 307, 308.)

California cases cited by Horton (*People* v. *Albritton* (1982) 138 Cal.App.3d 79 and *People* v. *Murray* (1978) 77 Cal.App.3d 305) follow *Coolidge* without addressing the impact of *North*. As we announced in *People* v. *Miller* (1987) 196, Cal.App.3d 846, "[w]e are persuaded that the Supreme Court specifically rejected the inadvertence requirement in *North*, and, consequently, we are bound by stare decisis to follow the Supreme Court's position on this issue." (*Id.* at p. 851.)

In short, there is no 'inadvertence' requirement in California. "[T]he fact that the officer had foreknowledge of the presence of the evidence in that place is of no constitutional significance." (*Ibid.*)

The Nexus Requirement

In *Arizona* v. *Hicks* (1987) 107 S.Ct. 1149, the U.S. Supreme Court determined that the police may not seize property in plain view unless the officer has probable cause to believe that the item in question is evidence of a crime or contraband. As expressed by the California Supreme Court, the officer must be "presently aware of some specific and articulable fact from which a rational link between the item seized and criminal behavior can be inferred." (*People* v. *Superior Court (Meyers)* (1979) 25 Cal.3d 67, 73.)

Horton takes the position that this "nexus" was not present here. This argument goes as follows: At the time of the search the police did not know that Horton was an ex-felon. The handgun by itself was therefore not contraband. Neither were the coin show advertisement, the handcuff keys or the clothes. The Uzi was concealed in a gun case; since the short barrel was not attached at the time it was found, it was also not contraband.

This argument is without merit. The eight-page police crime report, which described the robbery in considerable detail, was attached to the affidavit supporting the search warrant. Sgt. Larault, who executed the warrant, testified that he was fully apprised of the details of the robbery. On the basis of the information contained in the police report, law enforcement officers conducting the search selectively seized only those items of evidence they believed to be weapons or articles used in the commission of the robbery. Although numerous other handguns and rifles were located at the residence, they were not seized because there was no "nexus" to this crime.

Authorities offered by Horton in support of his position are inapposite. In *People* v. *Murray, supra*, 77 Cal.App.3d 305, police seized two television sets not described in the warrant based upon their observations upon entering the premises of some 67 television sets, many with the serial numbers removed. The court held that these circumstances did not establish that the officers in fact knew which items were contraband and which were not. (*Id.* at pp. 311-312.)

Similarly in *Nunes* v. *Superior Court* (1980) 100 Cal.App.3d 915 the court invalidated the seizure of certain items taken on the general suspicion that they matched descriptions of stolen property contained in police reports not in the searching officer's possession.

Clearly these cases are not on point. The officers in our case were in possession of the police report describing the crime and their search was directed to items connected to that crime.

There is no indication that they used the warrant as a pretext to conduct a general exploratory search of Horton's residence.

II. COMPETENCE OF COUNSEL

The contentions in this section present the question whether Horton received effective assistance of counsel. In addition, in the following section regarding claimed prosecutorial misconduct, Horton contends that his attorney was inadequate in certain instances in failing to assert timely objections. In general terms Horton complains that trial counsel should have kept from the jury inadmissible evidence which impugned his character and tainted the entire case against him. The appeal and accompanying habeas petition raise identical issues. We will discuss them together while reserving some comments on the writ petition at the conclusion of section III.

In order to prevail on a claim of ineffective assistance of counsel, an appellant has the burden of proving by a preponderance of the evidence that (1) counsel's representation was deficient in that it fell short of prevailing professional standards of reasonableness, and (2) there is a reasonable probability that but for counsel's errors the result of the case would have been different. (*People* v. *Ledesma* (1987) 43 Cal.3d 171, 215-218; *Strickland* v. *Washington* (1984) 466 U.S. 668, 687.) Even if the burden is met in the first step, the claim is not proved unless the required prejudice is shown.

Failure To Stipulate To The Prior Conviction

Horton was charged in Count III with possession of a firearm by an ex-felon (Pen. Code, § 12021, subd. (a)).

On the first day of trial defense counsel made two motions. First he sought to have the prior offense tried separately from the present offenses. Secondly, he sought to exclude use of the prior offense for impeachment purposes on the ground that the prior was too remote to have any probative value. The court denied both motions.

By virtue of the reading of the information, the jury was informed that the charges against Horton included an allegation that he had been convicted of a burglary in Tennessee. When Horton took the stand defense counsel asked him about the prior conviction. He testified that in 1967 in Memphis, Tennessee, he had pleaded guilty to three counts of third degree burglary, possession of burglary tools, and burglary and larceny of an automobile. At that time he was 35.

Horton argues that, rather than let in this evidence counsel should have stipulated to his ex-felon status for purposes of establishing the necessary element of Count III. By so doing he could have kept the details regarding the nature of the prior conviction from the jury. Such a procedure was expressly sanctioned by the Supreme Court in the case of *People* v. *Valentine* (1986) 42 Cal.3d 170. In *Valentine* the high court considered the effect of Proposition 8 on the rule laid down by *People* v. *Hall* (1980) 28 Cal.3d 143. *Hall* had held that when a prior conviction is pertinent only to ex-felon status as an element of a currently charged offense, the jury may not learn either the fact of the nature of the prior conviction if defendant offers to stipulate he is an ex-felon.

Proposition 8 was passed by the voters in 1982, adding section 28 to article I of the state Constitution. The second sentence of subdivision (f) of this section, apparently directed at *Hall*, provides that "[w]hen a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court."

In *Valentine*, defendant offered to concede his prior convictions for purposes of establishing that element of a Penal Code section 12021, subdivision (a) charge; however, the trial court ruled that section 28, subdivision (f) required full disclosure of the nature of the priors in open court. The Supreme Court found that ruling to be error. *Any* prior felony, regardless of its nature, satisfies the ex-felon element of the offense. The nature of the prior is therefore not relevant evidence. (*Valentine*, *supra*, 42 Cal.3d at pp. 176-177.) The court concluded that

Proposition 8 does not require the nature of prior convictions to be proven to the jury if defendant stipulates to his ex-felon status. (*Id.* at pp. 181-182)

It is apparent from the record that Horton's attorney was unaware of the *Valentine* decision, which was handed down July 21, 1986, approximately 10 weeks prior to the start of trial on October 7. The following exchange ensued during the discussion of counsel's motions.

"The Court: . . . The constitution prevents you from stipulating to the status part of the crime in order to keep the proof of the prior out of the record.

"Mr. Mansfield [Defense Counsel]: Yes.

"The Court: Prop. 8 truth in evidence law clearly makes, gives the prosecutor the right and the authority and the duty to prove prior convictions where they constitute an element of the offense. So I don't believe I have a lot of choice in that matter."

Because the judge thought that the nature of the prior would have to be disclosed in open court, he saw no point in granting counsel's motion to keep the prior out for purposes of impeachment. He did, however, comment that "if the prior were discharged for enhancement I would be disposed to give you a protective order because a 23 year old prior would have very little probative value on questions of impeachment, but I don't think I have a lot of discretion in the matter."

Thus it appears that the nature of the prior conviction would not have come in at all, either in connection with the section 12021 offense or for purposes of impeachment, had counsel made the stipulation provided for by *Valentine*.

But we cannot find that counsel's omission prejudiced his client. Under *Valentine*, the jury would still have been informed of the bare fact that Horton had a prior felony conviction. While it forestalls the direct introduction of possibly prejudicial evidence, the *Valentine* stipulation creates a perhaps greater risk of harm. As the court observed in *People* v.

Rollo (1977) 20 Cal.3d 109, 119: "[I]t is highly unlikely that a jury which is advised only that the defendant has been convicted of 'a felony' will let the matter rest. Normal human curiosity will inevitably lead to brisk speculation on the nature of that conviction, and the range of such speculation will be limited solely by the imaginations of the individual jurors. Some may assume, for example, that the defendant's prior conviction was similar to or identical with the charge for which he is on trial. Others may speculate that the conviction involved some form of unspeakable conduct, such as torture murder, gang rape, or child molestation. Why else, the jurors might naturally ask, was the name of the crime withheld from them?" (*Id.* at p. 119, fn. omitted)

Valentine is thus a double-edged sword. It may well be advisable to "sanitize" the prior where that conviction was for the same crime (or a worse one), committed recently, as was the case in *Valentine*. On the other hand, where defendant's prior is remote and for a crime different from the one charged, as in Horton's case, *Valentine* cuts the other way. In such a case it may behoove a defendant to make a clean breast of it before the jury and demonstrate that he had nothing to hide, rather than allow the jurors to speculate about the nature of his prior conviction.

We cannot say that reasonably competent defense counsel, with knowledge of *Valentine* would necessarily have chosen to stipulate to his client's ex-felon status in this case. Consequently, we cannot find that the error here requires reversal. Moreover, any prejudicial effect was minimized by the remoteness of the prior as well as by limiting instructions given to the jury regarding the use of the evidence.

The Tape Recording

As part of the People's case in rebuttal, the District Attorney introduced into evidence a tape recording of telephone conversations between Sgt. Larault and Horton's wife and between the sergeant and Horton himself. The first part of the tape was played without objection.

In a conversation on March 21, 1985, Larault asked Mrs. Horton whether she went to the coin show Sunday, January 13. she responded that she had been advised by her husband's lawyer not to answer any questions. Sgt. Larault informed her that she was not bound to follow the advice of her husband's lawyer. He suggested that she call the lawyer and discuss the matter with him and that he, Larault, would do the same, after which he would call her back. In the next conversation, March 23, Mrs. Horton told Larault that she went to the coin show that Sunday. She could not, however, remember any specific times or details regarding her activities after the show. She asked Larault why he was questioning her. Whereupon Sgt. Larault began to explain to her the various events leading up to the issuance of the search warrant and the search of the residence.

At some point in this monologue, defense counsel objected on the basis that the recorded material did not rebut any witness testimony. The court asked counsel: "Have you gone over the tape to determine if parts should be excised . . .?" Counsel responded, "No, I am prepared to do so. I never thought we were going to hear these tapes, frankly." The court then dismissed the jury in order to discuss with counsel whether portions of the tape might be deleted.

Out of the presence of the jury the first portion of the tape was replayed. Counsel objected to the introduction of Sgt. Larault's statements and the judge agreed to admonish the jury that the taped conversations were to be considered only for the statements of Mrs. Horton, and that the officer's statements were to be disregarded except where they gave meaning to Mrs. Horton's responses.

Defense counsel lodged a continuing objection to use of the tape on the basis that it was improper rebuttal evidence. The jury was called back, given the requested admonishment, and the tape was started from the beginning of the conversation.

At the end of the conversation with Mrs. Horton, Horton came on the line. There ensued a conversation where Horton

demanded the return of property seized from his house by the police, and Officer Larault explained that certain property had been possessed illegally: namely the Uzi with the short barrel, and an impermissible quantity of marijuana. Horton protested that the marijuana was for home consumption by all five residents, whereupon the officer responded that the presence of some scales indicated that marijuana was being weighed and sold there.

Horton was unable to give any more details about the timing of his activities on January 13. He did, however, offer to meet with Larault, in the presence of his attorney. The conversation ended with Larault saying "You have nothing to hide[,] right?" and Horton responding: "I don't want to help you tidy up a circumstantial case against me. . . ."

Horton raises the following points concerning counsel's handling of the tape recording: 1) Counsel should have reviewed the tape before it was played to the jury; 2) He should have either made an in limine motion to exclude the entire tape as inadmissible hearsay or moved to exclude it under Evidence Code section 352; 3) If certain parts of the tape were admissible as prior inconsistent statements of Mrs. Horton, counsel should have stopped the tape when the conversation with Mrs. Horton was over.

The tape was apparently offered to rebut testimony that the police had unreasonably harassed the Horton family. For example, in her testimony on cross-examination, Mrs. Horton had denied that Officer Larault encouraged her to talk to her husband's lawyer before answering his questions. And Horton stated several times in his testimony that the police had bothered his wife at work and harassed his whole family. In addition he had insinuated that the police had stolen property from his home during the warrant search. The taped material was relevant for rebuttal purposes, not only because it contained prior inconsistent statements of Mrs. Horton, but also because it tended to show that the tone of the officer's questioning was not intimidating and it explained why certain property had not

been returned. Any prejudice occasioned by the officer's spontaneous statements about the law was slight and was further mitigated by the court's admonition that Larault's statements were not to be considered as evidence.

Horton claims that the bulk of the material on the tape was not relevant for any proper rebuttal purpose and was extremely prejudicial; consequently it would have been excluded had counsel raised an objection on those grounds under Evidence Code section 352. The parts he finds most objectionable are the officer's references to the marijuana found in the house and his own statement that he did not intend to help the police tidy up a circumstantial case against him.

In regard to the mention of marijuana and scales taken from the house, previous testimony during the case in chief had established quite clearly that Horton's son was selling marijuana and that those items had been found in his room. Therefore this information could have very little added prejudicial effect. As to his comment that he did not want to help police tie up a case against him, this constituted an admission and was consequently admissible under Evidence Code section 1220 in any case.

In conclusion we agree that reasonably competent defense counsel would have previewed a tape recording in which a defense witness and defendant himself engaged in conversation with a police officer, and should have been prepared to interpose objections to its admission before it was played to the jury. The Attorney General argues that defense counsel here did in fact preview the tape and simply decided the material was relatively innocuous. We are unable to determine from the record whether counsel was aware of the contents of the tape or not. But it makes no difference, since we find that the taped material was admissible for purposes of impeachment and as an admission. As to the rest any prejudice was minimal, and the jury was duly admonished.

III. PROSECUTORIAL MISCONDUCT

Horton argues that the prosecutor engaged in a number of incidents of misconduct which prejudiced the jury against him.

In those instances where no objection was made, he argues that an objection followed by an admonition would not have cured the error. (*People* v. *Perez* (1962) 58 Cal.2d 229, 250.) In the alternative, if an admonition would have cured the error, he contends that counsel was ineffective in not raising the objection. In cases where counsel did object and an admonition was given, he argues that the prejudice was nonetheless not dispelled.

The first two instances involve evidence elicited at trial regarding marijuana in the Horton household and Horton's employment at a methadone clinic, the claim being that the prosecutor was deliberately trying to portray Horton and his family as drug addicts. The second two incidents occurred during closing argument and involve the prosecutor's use of Horton's tape recorded statements, and his characterization of Horton and the alibi witnesses as perjurers.

The Marijuana Evidence

This evidence came out in the following way. Horton's son Terry junior was called as a witness during the People's case in chief. In the course of establishing the ownership and location of the various guns in the house, he was questioned about events that took place the day Sergeant Larault executed the search warrant. On cross-examination, defense counsel asked him: "You were arrested by Sergeant Larault as an accomplice in this case, weren't you?" He answered "Yes, I was." He then testified that his hands were handcuffed behind his body, that Sgt. Larault's manner was intimidating, and that he was kept in custody for at least a half an hour. On redirect, the prosecutor asked Terry if he wasn't in fact arrested for selling marijuana, to which he replied no. The prosecutor then showed him a photo taken from his room which Terry identified as a picture of himself holding a Thai stick. Further testimony revealed that marijuana and scales had been found in Terry's room. On recross, Terry stuck to his testimony that Sgt. Larault had arrested him as an accomplice. He denied that he had been selling marijuana.

When Sgt. Larault took the stand he described in some detail the evidence of marijuana found in Terry's room, including two "bricks" of marijuana. The judge interrupted this testimony to remind the jury that the evidence they were hearing was being received "solely on the issue of credibility of Samuel [Terry] Horton . . . with regard to his statement that he was arrested as an accomplice and not for the sale of marijuana." The jury was specifically admonished.

There followed testimony by the officer that Terry had been detained while the search proceeded and that police had thought initially he might be a possible co-defendant. When marijuana was found in Terry's room, he advised Terry per *Miranda*, at which point Terry informed him that he used marijuana and the whole family used it, and that he sold approximately $230 worth of marijuana a week to others.

During the defense case, it was eventually established that the "bricks" of marijuana Sgt. Larault described were firecrackers, not marijuana. On the other hand, Terry admitted on the stand that he had been selling approximately $230 worth of marijuana a week. The prosecutor asked if his family knew about this and Terry answered "Yes" before an objection, which was sustained, could be interposed.

Horton contends that the prosecutor deliberately elicited inadmissible and prejudicial testimony regarding marijuana use and sale in the Horton household and that such a tactic amounts to prosecutorial misconduct. (*People* v. *Evans* (1952) 39 Cal.2d 242.) As the summary of testimony shows, however, evidence of Terry's involvement in marijuana sales was brought out only after Terry had testified that he had been arrested as an accomplice.

Horton points out that Officer Larault admitted he had initially detained Terry as a possible co-defendant; therefore his testimony in essence tended to corroborate, rather than refute, Terry's and the marijuana evidence was not necessary for any impeaching purpose. We disagree. Defense cross-examination of Terry left the impression that he had been intimidated by

police and arrested for a crime he didn't commit. The prosecution was entitled to put on evidence tending to prove the contrary. The court so ruled and duly admonished the jury as to the limited use of the evidence. Evidence regarding the sale of $230 per week worth of marijuana was likewise admissible since Terry had specifically denied he was selling that amount or any amount of marijuana. In regard to the picture of Terry holding a Thai stick, that picture was stricken from evidence at counsel's request.

Because the marijuana evidence was introduced with the proper purpose of impeaching a witness' credibility, and was expressly limited to that purpose by the court's admonishment, no prosecutorial misconduct occurred here. Horton argues nonetheless that reasonably competent defense counsel would have been aware of what was found in the house and would have made an in limine motion to keep out any evidence regarding marijuana use and sales in the household because of its highly prejudicial nature. Even had such a motion been made and granted, however, the evidence would have been admissible on the issue of Terry's credibility. Finally, the prejudice resulting from the introduction of the marijuana evidence reflected only indirectly upon Horton himself. We do not find it reasonably probable that a result more favorable to him would have occurred had this evidence been excluded. (*People* v. *Ledesma*, *supra*, 43 Cal.3d at pp. 215-218.)

Defendant's Employment At A Methadone Clinic

Evidence that Horton was working at a methadone clinic at the time of the robbery first came in during the D.A.'s direct examination of Terry junior as to the possible reasons why Horton possessed handcuffs. Later, during his cross-examination of Mrs. Horton, the prosecutor returned to this point. When Mrs. Horton described her husband as a county employee, he pressed her for the specific information: "Well, come on, Mrs. Horton, are you just—your husband worked for the methadone clinic, right?" Counsel immediately objected and the court declared a recess.

Out of the presence of the jury the prosecutor explained that the relevance of the question was to show "we have heroin addicts." The judge sustained the objection and agreed to admonish the jury.

When court reconvened with the jury present, however, no admonishment was given. Horton argues that he was prejudiced by this incident because any knowledgeable juror would conclude from the mention of the methadone that Horton had drug connections or was a heroin addict. We do not agree that these are necessarily commonly held assumptions. Moreover, when Horton took the stand he gave testimony regarding his employment. He had worked for the county of Santa Clara since 1971 as a mental health specialist. For approximately 13 months of his 15-year tenure with the county he had been assigned to Hillview Methadone Clinic. His duties there included setting up test sheets, collecting urine specimens and logging the results, and filling out Medi-Cal forms. We believe this testimony sufficiently rehabilitated Horton and diffused any taint caused by the prosecutor's reference to the methadone clinic.

Reference To Defendant's Prearrest Silence

In closing argument the prosecutor stressed the point that two months after the robbery when Horton was being questioned by Sergeant Larault, he offered no alibi, nor any alibi witnesses, the obvious implication being that his behavior was inconsistent with that of an innocent man. These were some of his comments: "You won't find the defendant crying of his innocence on that tape—in other words, I, I've got two different occasion[s], I just don't want to help you tie up a circumstantial evidence in this case either. [¶] At that point Sergeant Larault wasn't leaning on them or being barbaric or anything saying I just want to talk to you. I just want to get some information. Perfect opportunity for them to give the information they would have given, should have given if in fact they had a decent alibi, but they don't."

Horton argues that these statements have a tendency to confuse the jury regarding the burden of proof by suggesting that the defendant must come forward to prove his innocence rather than the prosecution proving his guilt. He claims this is an impermissible comment on a defendant's right not to speak to police, and violates the rule expressed in *Griffin* v. *California* (1965) 380 U.S. 609.

As we have noted, Horton's statement that he didn't want to help the police tie up their case against him was admissible as an admission under Evidence Code section 1220. Moreover, where a defendant fails to speak, or makes an evasive or equivocal reply, his silence may be used against him as an implied or adoptive admission, unless he was relying on his Fifth Amendment right of silence. (Evid. Code, § 1221; *People* v. *Preston* (1973) 9 Cal.3d 308, 314.)

In *Jenkins* v. *Anderson* (1980) 447 U.S. 231, the defendant, accused of murder, claimed for the first time at trial that the killing had been in self-defense. The prosecutor cross-examined him about whether, prior to the arrest, he told police about the incident. The Supreme Court held that the Fifth Amendment is not violated by use of *pre*arrest silence to impeach a criminal defendant's credibility. (*Id.* at p. 237.) Under similar circumstances in *People* v. *Free* (1982) 131 Cal.App.3d 155 the court followed *Jenkins* in concluding that the California rule is that "[p]rearrest silence may be commented upon unless the court finds the silence was an invocation of Fifth Amendment rights." (*Id.* at p. 165.)

The conversation referred to here between Horton and Sergeant Larault took place well before his arrest and was not preceded by any *Miranda* warnings. On the other hand, it was clear that Horton was a suspect in the case since his house had been searched and he was being questioned about events on the day of the robbery. Furthermore, it appears that he was relying upon his constitutional rights when he told Larault he would answer further questions only in the presence of his attorney. In such a case it is improper to comment upon his silence. (*People* v. *Preston*, *supra*, 9 Cal.3d 308, 315.)

No objection was raised here regarding the prosecutor's remarks about Horton's prearrest silence. In fact defense counsel in his closing argument urged the jury to play the end of the taped conversation between Larault and Horton and listen to his client, when confronted by Sgt. Larault, volunteer to come to the police and talk. Clearly defense counsel felt that Horton's expressed willingness to talk was evidence of his innocence.

Because there was no objection, the question of prosecutorial misconduct was not preserved for appeal. (*People* v. *Baines* (1981) 30 Cal.3d 143, 149.) And the record shows that counsel's omission resulted from a tactical choice which we cannot say was outside "the range of reasonable competence." (*People* v. *Pope* (1979) 23 Cal.3d 412, 426.) Therefore, the claim of ineffective assistance of counsel must also fail. (*People* v. *Ledesma*, *supra*, 43 Cal.3d at p. 216.)

References To Perjury

In his closing argument the prosecutor characterized defense testimony as a "parade of perjury", repeating this phrase several times. And in his rebuttal remarks, after pointing out certain inconsistencies in the testimony of defense witnesses, he said this: "You don't like to think that people are actually going to lie to you, but it happens all the time in these walls in this building. If we prosecuted all the perjury that went on in criminal and civil trials—" Here he was interrupted by an objection. There followed a discussion at the bench, after which the court asked the prosecutor to rephrase his statement, explaining to the jury: "Lawyers are entitled to argue matters that are in evidence before the jury and matters that are common knowledge to the public at large and I suppose inferences that can be drawn by reason and logic from facts that are established in evidence." The prosecutor then resumed argument, explaining: "The problem I guess is the word "perjury". Maybe I better word it you have to decide who's telling you the truth or not. . . ."

Horton directs us to several cases which have found that a prosecutor commits misconduct when he refers to the defense witnesses as perjurers. (*People* v. *Ellis* (1966) 65 Cal.2d 529; *People* v. *Reese* (1963) 220 Cal.App.2d 143, 146; *People* v. *Conover* (1966) 243 Cal.App.2d 38.) The *Reese* case stated the reason behind this rule: "A witness on the stand cannot be impeached by an accusation of perjury unless the witness has been convicted thereof, since impeachment of this character stems from a prior conviction of a felony. An attorney should not be permitted to accomplish by argument that which he is precluded from doing by cross-examination." (*People* v. *Reese*, *supra*, at p. 147.)

The *Reese* court recognized, however, that not every instance where the word perjury is used will amount to misconduct. The district attorney prosecuting Reese, rather than pointing out discrepancies in the testimony of each witness and explaining to the jury how this indicated false testimony, which he had a perfect right to do, simply "branded defendant's witnesses as possible felons." (*Id.* at p. 147.) The critical distinction between permissible and impermissible argument is whether the prosecutor's comments are drawn from the evidence before the jury. (*People* v. *Ellis*, *supra*, 65 Cal.2d 529, 540.) "The words 'lie' and 'perjury' are the expressions commonly used to describe willfully false testimony, and there is no reason why a prosecutor must resort to circumlocutions when discussing this distasteful but pertinent subject . . . [¶] The test . . . is whether the argument was fairly based on the evidence." (*People* v. *Garrison* (1966) 246 Cal.App. 2d 343, 352-354.)

In our case the prosecutor reviewed the testimony of the defense witnesses in considerable detail, pointing up discrepancies and inconsistencies, and asked the jury to apply common sense and logic to draw the conclusion that the alibi did not have "the ring of truth" about it. We do not believe that this argument could have raised in the jurors' minds the inference warned against in *Reese* that the witnesses were felons. In our view it makes no difference whether the prosecutor argued that the witnesses deliberately lied or suggested that they had

perjured themselves; an attack upon the testimony of these witnesses is fair comment upon the evidence. (*People* v. *Garrison*, *supra*, at p. 355.)

Even had the prosecutor's reference to the "parade of perjury" amounted to improper argument, any possible prejudice arising therefrom was cured by the admonition of the judge and the retraction by the prosecutor.

THE WRIT PETITION

Horton claims that the various instances where counsel fell short of professional standards, including his failure to object to incidents of prosecutorial overreaching, together had a cumulative effect which deprived him of a fair trial. (*People* v. *Hudson* (1981) 126 Cal.App.3d 733, 741.) He argues that because the outcome of the case depended on the jury's determination of the relative credibility of the prosecution and defense witnesses, evidence which presented Horton and his family to the jury as people with criminal tendencies could have tipped the balance. Finally he points out that the prosecutor was engaged in a deliberate strategy to portray the Hortons as drug addicts. Because counsel failed to keep out the prejudicial evidence, he argues, he was denied the assistance of a reasonably competent attorney.

We have addressed each of Horton's claims and have found each to be harmless error or not error at all. We do not find that their cumulative effect is such as to warrant reversal. The evidence was not closely balanced in this case. The victim, who was trained in voice identification and knew Horton personally, positively identified Horton's voice as that of the man who robbed him. Three weapons, two of them extremely uncommon, fitting his description of those used in the robbery were found in Horton's home. Handcuff keys were also found. An eyewitness who saw Horton fleeing the scene with what appeared to be a gun under his arm identified him from a photo lineup shortly after the robbery. Moreover, Horton knew the victim was the treasurer of the coin club, knew the club was

putting on a three day coin show, knew when the show ended, and could easily conclude that the victim would be returning home shortly thereafter with the receipts. In light of the overwhelming evidence of guilt, we find that appellant has failed to show that a determination more favorable to him would have resulted in the absence of the errors he claims. (*Strickland* v. *Washington*, *supra*, 446 U.S. at pp. 693-694.)

In his petition for a writ of habeas corpus, Horton has included two declarations by members of the defense bar who state their opinions that competent defense counsel would have acted to keep out evidence of Horton's prior conviction, all evidence on the tape recording, and all evidence regarding marijuana and methadone, and that they can conceive of no tactical reason for allowing this evidence before the jury. Also included is appellate counsel's declaration that trial counsel refused to talk to her about the case. Even if counsel's representation in certain instances fell below an objective standard of reasonableness under prevailing professional norms, no miscarriage of justice has been shown, as we have discussed above. The writ petition therefore does not add anything of substance.

IV. SENTENCING ERROR

Horton was sentenced to the upper term of six years for the robbery, and a consecutive term of eight months for possession of a concealable firearm by an ex-felon (Count III). His sentence was enhanced by two years under Penal Code section 12022.5, subdivision (a) for use of a firearm in the commission of a felony. He makes two claims regarding his sentence: 1) the judge used the same fact to impose the aggravated term and the enhancement; and 2) the judge failed to state his reasons for imposing the eight-month consecutive sentence for Count III. There was no dual use of a fact and the failure to state reasons was harmless error, not requiring remand.

Dual Use Of A Fact.

Horton contends that the court considered the use of the Uzi during the robbery as a factor both to impose the aggravated

term and to enhance his sentence under Penal Code section 12022.5, subdivision (a). If so, the evidence violated California Rules of Court, rule 441(c). (*People* v. *Arbee* (1983) 143 Cal.App.3d 351, 356.)

The judge stated his reasons for imposing the sentence as follows: "I find this a particularly vicious crime, and I have no doubt in my mind that Mr. Horton is guilty of this and he involved others and that he found others establishing an alibi which I believe also was contrived. It's also established by the type of weapon that's used and the severe force in using the stun gun repeatedly on his back, victim's back, which amounted to torture of the victim.

"All in all it is an aggravated case and I intend to impose the aggravated punishment, and he's got prior convictions, he's been to prison, to the case. I see nothing to mitigate the case at all. And the type of weapon that was involved possessed by an ex-convict is a status all by itself and doesn't come under section 654. So it's my intent to impose an eight year eight month term in this case."

The usual circumstances in aggravation and mitigation are set forth in California Rules of Court, rules 421 and 423. The judge articulated four factors in aggravation: 1) the crime involved a high degree of cruelty, viciousness or callousness (rule 421(a)(1)); 2) the defendant involved others in the crime (rule 421(a)(5)); 3) he suffered prior convictions of increasing seriousness (rule 421(b)(2)); and he had served a prior prison term (rule 421(b)(3)). He found no factors in mitigation.

Horton mistakenly understood the judge to refer to the Uzi as an aggravating factor. We agree with the Attorney General that the judge referred to the "type of weapon" twice to describe two different weapons. In the first case he was referring to the stun gun to explain his finding that the crime involved a high degree of cruelty. In the second instance, the reference was to the Uzi to explain that possession of that weapon is a crime in itself under Penal Code section 12021, subdivision (a) and thus did not fall within the proscription

against double punishment contained in Penal Code section 654.

There was no dual use of facts.

Failure to State Reasons

The Attorney General concedes that the judge did not state separate reasons for imposing a consecutive sentence for Count III (Pen. Code, § 1170, subd. (c)), but argues that the error was harmless because it is not reasonably probable that Horton would obtain a more favorable sentence on remand. (*People* v. *Avalos* (1984) 37 Cal.3d 216, 233.) We agree.

California Rules of Court, rule 425 provides that factors supporting imposition of consecutive sentences may include any circumstances in aggravation under rule 421. In this case there were four valid aggravating circumstances, any one of which is sufficient to authorize imposition of the upper term. (*People* v. *Burney* (1981) 115 Cal.App.3d 497, 505.) The remaining three aggravating factors cited by the court are available to support the imposition of a consecutive sentence.

The judge's comments made clear that he found Horton's crime to be a particularly vicious one, warranting aggravated punishment. In light of this, remand for resentencing would be an exercise in futility, since the trial court would simply restate the various factors and impose the same sentence.

DISPOSITION

The judgment is affirmed and the petition for writ of habeas corpus is denied.

APPENDIX B

In The Supreme Court Of The State Of California

IN BANK

PEOPLE
v.
TERRY HORTON

Appellant's petition for review DENIED.

/s/ LUCAS
Chief Justice

Dated: March 15, 1989

RESPONDENT'S

BRIEF

(6) COPY
Supreme Court, U.S.
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JAN 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-7164

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TERRY BRICE HORTON,
Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Where a warrant search is conducted within the authorized area and duration, may the police seize items not named in the warrant for which probable cause is, or could have been, established in the supporting affidavit?

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No. 88-7164

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TERRY BRICE HORTON,
Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

BRIEF FOR RESPONDENT

OPINION BELOW

The unpublished opinion of the Court of Appeal of the State of California, Sixth Appellate District, filed November 30, 1988, is included in the Joint Appendix at JA 43-77. The unpublished order of the California Supreme Court, filed March 15, 1989, denying review, is included in the Joint Appendix at JA 78.

JURISDICTION

Jurisdiction is conferred by Title 28, United States Code, section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

> United States Constitution, Amendment IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

United States Constitution, Amendment XIV, section 1:

> "[N]or shall any State deprive any person, of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Following a preliminary hearing, on August 23, 1985 the Santa Clara County District Attorney charged petitioner with robbery inside a residence with use of a firearm (Cal. Pen. Code, §§ 211, 213.5, 12022.5, 1203.06); false imprisonment with use of a firearm (Cal. Pen. Code, §§ 236, 237, 12022.5, 1203.06); possession of a concealable firearm by an ex-felon (Cal. Pen. Code, § 12021(a)); and

possession of a short-barreled Uzi machine gun (Cal. Pen. Code, § 12020(a)) (CT 175-176, 207-208).[1/] Though petitioner was held to answer, the preliminary hearing magistrate suppressed an Uzi machine gun, a .38 caliber revolver, handcuff keys and handcuffs, two jackets, two electric stun guns, and a 3 x 5 card associated with a coin club, on the ground that these items were not listed in the search warrant (CT 160-165).

On September 23, 1985, pursuant to the district attorney's motion under California Penal Code section 1538.5(j), the suppressed evidence was ruled admissible by the superior court (CT 243, 273; see CT 203-205, 210-218, 238-241).

Petitioner pleaded not guilty, was tried by a jury, and on October 21, 1986, was convicted as charged (CT 209, 428-429). On November 17, 1986, petitioner was sentenced to eight years and eight months in prison (CT 431).

On Sunday, January 13, 1985, at about 6:30 p.m., petitioner and another man robbed Erwin Wallaker of jewelry and money (RT 93-94, 101, 103-104). Wallaker had just returned home from a coin club show at which petitioner had been present (RT 53-54, 56, 67, 148). Wallaker, the coin club treasurer, had the show's proceeds with him (RT 53, 56, 72-73). Wallaker opened his garage door and was walking through the garage to enter his house when he was confronted by the robbers (RT 75-77, 80, 83, 85).

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1. CT designates the clerk's transcript on appeal; RT refers to the reporter's transcript on appeal. The Joint Appendix has previously been referred to as JA.

The robbers wore Halloween masks and were armed with an Uzi machine gun, a short-barreled revolver, and an electrical shocking device (RT 83, 85-87, 100, 109). Wallaker was handcuffed, hogtied, gagged, and partially blindfolded (RT 92, 94, 99, 106).

When the robbers left, Wallaker attracted the attention of three young people walking by his open garage, who came to his aid and called the police (RT 114-115). Wallaker was treated at the hospital and received several stitches at the back of his head (RT 116). He sustained 30 or 40 burn marks, in pairs, on his back (RT 117).

Early the following morning, Wallaker realized that the distinctive Southern accented voice of one of the robbers was petitioner's. Wallaker was familiar with petitioner and his voice from coin club meetings (RT 123, 125, 127). He notified police and ultimately positively identified petitioner's photograph. One of Wallaker's rescuers, Lisa Miller, also selected petitioner's photo from a lineup, but could not positively identify him in court (RT 192, 195, 199, 265, 274).

Petitioner denied committing the robbery and supported his alibi through family and friends (RT 225, 392-394, 446-447, 492-494, 513-514, 531, 542-544). Many of these witnesses stated that petitioner's hair, usually gray and shoulder length as Wallaker and Miller testified (RT 68, 189-190), had been dyed reddish-blond at about the time of the robbery (RT 221, 397, 472, 486, 490, 517-544). Petitioner surmised that Wallaker identified him as one of the robbers because of two incidents: first, petitioner complained to Wallaker about overpriced coins Wallaker sold to petitioner's daughter; second, Wallaker

was offended by a disparaging remark petitioner made about him at a coin club show (RT 555, 560-562).

Sergeant Gary Larault, who investigated the crimes, prepared the affidavit for the search warrant executed at petitioner's residence on January 30, 1985 (RT 252; CT 221-223; JA 2-4). The warrant authorized a search for three specifically described rings stolen during the robbery (CT 219-223; JA 2-4, 13-15). The warrant affidavit incorporated police reports which detailed the events of the crime. These reports specified that the robbers used a machine gun, a blue steel two-inch revolver, an electrical shocking device, handcuffs, and that they wore certain clothing (CT 224-227; JA 5-9).

With reference to the seized 3 x 5 coin club card, the reports also noted that Wallaker had been at the coin show and that petitioner was a member of the same coin club (CT 227, 230; JA 8, 11). Wallaker told Sergeant Larault that he may have seen petitioner at the coin club show on the day of the robbery (CT 249, 259).

Sergeant Larault searched petitioner's residence and seized an Uzi machine gun with a long barrel and a loaded short clip, a short barrel, a loaded long clip, a .38 caliber revolver, two operable Nova XR 5000 stun guns, handcuffs and handcuff keys, a San Jose Coin Club advertising brochure, and a few items of clothing (RT 29-34, 254-259, 274-275).[2/] Although other handguns and rifles were found in petitioner's residence, only the Uzi and the .38 were seized and admitted into evidence.

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2. The clothing was not offered into evidence at the trial (CT 154; JA 32; see RT 274-275 and index of trial exhibits in volume 1 of the reporter's transcripts).

Firearms which did not match Wallaker's description were not seized (CT 257; JA 30).

Though only the rings were particularly described in the warrant proper, Sergeant Larault testified that during the search for the rings he also looked for other evidence connecting petitioner to the robbery (CT 154-155, 258-268; JA 27-28, 35-38). All the items seized were found in plain view during the search for the rings (CT 151-158, 254-262; JA 19-24). The rings were never found (RT 272).[3]

SUMMARY OF ARGUMENT

The police obtained and executed a valid warrant. During their lawful search, they found items not named in their warrant but for which the warrant affidavit established probable cause. Solely because the seizure of the unnamed items was not "inadvertent," petitioner contends the seizure was unlawful. We respond that since police had prior Fourth Amendment justification -- here

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3. During the superior court hearing on the prosecutor's motion to reverse the suppression order, the prosecutor asked Sergeant Larault if he listed only the rings to mislead the magistrate or as a pretext in order to search for the unnamed items described in the affidavit. Petitioner's relevancy objection was sustained (CT 255-256). Subsequently, petitioner argued that the search was pretextual (CT 269). The prosecutor responded that the "deputy district attorney who drafted this particular search warrant did less than a superlative job in listing what was normally sought in our county . . ." (CT 272).

judicial authorization -- for their entry and search and probable cause to seize the items, the seizure deprived petitioner of no cognizable privacy or possessory right.

The requirement of inadvertence was added to the requirements of a lawful initial intrusion and probable cause for warrantless plain view seizures in *Coolidge v. New Hampshire*, 403 U.S. 443, 465-471 (1971). Inadvertence has never been expressly adopted by a majority of the Court; *Coolidge* is not a binding precedent on this point. *Texas v. Brown*, 460 U.S. 730, 736-737 (1983) (plurality opinion).

When police execute a valid warrant within the authorized area and duration, the property owner has no privacy interest in items consequently observed. The magistrate's authorization serves to prevent the search from becoming general and exploratory. If the search goes beyond that authorized, if the police look in a desk drawer for a piano, or continue to search after all the items named in the warrant have been found, any subsequent seizures would be invalid. The limited authorization of the initial intrusion thus provides an inherent limitation on the search itself, naturally proscribing general and exploratory searches. Requiring inadvertence risks the loss of evidence while adding nothing to privacy.

Plain view seizures on private premises are authorized by probable cause provided that access to the seized object has prior Fourth Amendment justification. The warrant requirement is relaxed because there is no significant additional invasion of privacy in the seizure and the possessory interest is adequately protected by the probable cause requirement. The requirement of

inadvertence protects no possessory interest beyond that already safeguarded by the need for probable cause and lawful access.

In the name of limiting invasions of privacy, the inadvertence requirement could actually expand them. Should the police forget to name items in the warrant for which they had pre-existing probable cause, no reason appears why they should not be able to return to the magistrate for a second authorized search. Meanwhile, it may be necessary to maintain the status quo by securing the area to be searched until the warrant arrives. Entire premises would be seized because one or more items inside were not found inadvertently.

The police have no incentive to omit items from the warrant for which they have probable cause, for the longer the list of items, the longer and more intense the search will be, and the more likely incriminating evidence may be discovered fortuitously.

There was no reason to use the plain view doctrine as a pretext under these circumstances. All the seized items were evidence of the same crime and probable cause for their seizure was presented to the magistrate. The officer's intent to look for and seize unnamed items is irrelevant. Compliance with the Fourth Amendment is not measured by officers' intentions and motivations, but by the objective reasonableness of their conduct. Here the search did not go beyond that authorized by the magistrate and is, accordingly, valid.

Finally, suppressing the evidence would have scant deterrent effect. The omission was not deliberate and deprived petitioner of no privacy or possessory right. Any assumed violation of the Warrant Clause is purely abstract

and theoretical. The police were entitled to rely on California law rejecting the inadvertence requirement in view of the lack of any clearly established contrary holding from this Court.

ARGUMENT

I

SINCE THE POLICE CONDUCTED THE WARRANT SEARCH WITHIN THE AUTHORIZED AREA AND DURATION, THEY PROPERLY SEIZED ITEMS NOT NAMED IN THE WARRANT FOR WHICH PROBABLE CAUSE WAS, OR COULD HAVE BEEN, ESTABLISHED IN THE AFFIDAVIT.

In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), a plurality of the Court set forth three requirements essential to lawful plain view warrantless seizures. First, the police must lawfully acquire the vantage point from which they view the seized object. Second, the police must discover incriminating evidence inadvertently.[4/] Third, it must be immediately apparent to the police that the observed items may be evidence of a crime, contraband, or otherwise subject to seizure. *Id.*, at pp. 465-471. Petitioner contends that in this case the police violated the inadvertence element of *Coolidge* because they "knew," "expected," "planned," and "intended" to search for items related to the Wallaker robbery but not named in the warrant. Brief for the Petitioner at pp. 9-10, 14-15. Recognizing that *Coolidge* is a nonbinding

4. A review of the parties' briefs and the oral argument transcript in the *Coolidge* case reveals that the word "inadvertence" was not mentioned.

plurality opinion on this point,[5/] *Texas v. Brown*, 460 U.S. 730, 737 (1983) (plurality opinion); *Arizona v. Hicks*, 480 U.S. 321, 334 (1987) (dissenting opinion), petitioner urges a majority of the Court to embrace inadvertence as a requirement for a valid plain view seizure. In essence, petitioner reiterates the rationale in *Coolidge*. We believe that the inadvertence requirement protects neither privacy nor possessory interests and should be discarded.

As the *Coolidge* plurality explained, the plain view doctrine avoids unnecessary inconvenience and the risk of loss of evidence to law enforcement without subverting the two discrete purposes of the Fourth Amendment's warrant requirement: first, to eliminate altogether searches conducted without probable cause by interposing a magistrate between the citizen and the police; second, to limit the scope of searches justified by probable cause, thereby preventing general, exploratory rummaging in personal effects. *Coolidge v. New Hampshire, supra*, 403 U.S. at pp. 467-468.

> "The rationale of the exception to the warrant requirement, as just stated, is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a 'general' one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and

5. Brief for the Petitioner at p. 8; but see *ibid.* at p. 8, fn. 1.

> intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of 'exigent circumstances.'" *Id.*, at pp. 469-471.

The first plain view requirement demands that the initial police intrusion be lawful. That requirement is satisfied by a search warrant, as in this case, or by circumstances constituting an exception to the warrant requirement (e.g., hot pursuit, search incident to arrest). When, as here, the search is limited to the area and duration authorized by the initial intrusion, the defendant has suffered no constitutionally cognizable privacy deprivation. "[O]nce police are lawfully in a position to observe an item firsthand, its owner's privacy interest in that item is lost; the owner may retain the incidents of title and possession but not privacy." *Illinois v. Andreas*, 463 U.S. 765, 771 (1983); *Coolidge v. New Hampshire, supra*, at p. 515 (White, J., concurring and dissenting).

We readily concede that had the police exceeded the area or duration of the warrant, any resulting seizures would be invalid. *Coolidge v. New Hampshire, supra*, 403 U.S. at p. 517 (White, J., concurring and dissenting); see *United States v. Ross*, 456 U.S. 798, 820-822 (1982); *Harris v. United States*, 331 U.S. 145, 152-153 (1947); 2 La Fave, Search and Seizure, a Treatise on the Fourth Amendment (2d ed. 1987), § 4.11(d), pp. 324-331 (hereinafter La Fave). But, since all the seized items were found in

places where the rings could have been concealed, and since none of the rings was found, the police did not exceed the scope of the warrant. To the contrary, although the police observed many firearms, only the two that matched the victim's description were seized. The authority for the initial intrusion thus provides an inherent limit on the area and duration of the search, and therefore a limit on general and exploratory searches. "'Plain view' is perhaps better understood, therefore, not as an independent 'exception' to the Warrant Clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be." *Texas v. Brown, supra*, 460 U.S. at pp. 738-739 (plurality opinion). The prior justification substitutes for the intervention of a magistrate.

Similarly, another plain view requirement authorizes warrantless seizures only when an officer lawfully on private premises has probable cause to associate the item with criminal activity. *Arizona v. Hicks, supra*, 480 U.S. at pp. 326-327; *United States v. Jacobsen*, 466 U.S. 109, 113-114, 121 (1984); *Illinois v. Andreas, supra*, 463 U.S. at p. 771; *Texas v. Brown, supra*, 460 U.S. at pp. 738-739 (plurality opinion); *id.*, at pp. 748-749 (concurring opinion). "The plain-view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity." *Illinois v. Andreas, supra*, 463 U.S. at p. 771. In short, the defendant has no privacy interest and his possessory interest "is protected by the requirement that there be probable cause for the seizure of an object in plain view."

2 La Fave, *supra*, § 4.11(d), p. 353 fn. 76.

Under these circumstances, requiring inadvertence protects no Fourth Amendment value other than ritualistic adherence to the occasionally applicable principle that warrants are required whenever it is practical to obtain one. See 1 Cook, Constitutional Rights of the Accused (2d ed. 1985), § 3:5, pp. 343-344 (hereinafter Cook); *Cooper v. California*, 386 U.S. 58, 62 (1967).[6/] Of course, this same abstract and theoretical "violation" of the warrant requirement occurs even when the discovery and seizure is inadvertent. See 1 Cook, *supra*, § 3:5, p. 343. The *Coolidge* plurality was willing to waive a warrant in this latter circumstance, however, because the inconvenience of obtaining the warrant is great and the police risk loss of the evidence in the interim. Although the same inconvenience and danger exists, *Coolidge* is unwilling to extend the same forgiveness where the discovery was foreseeable, because the police did not obtain a warrant for these items in the first instance. Yet, *Coolidge* is willing to waive inadvertence when the item is contraband, stolen property, or dangerous in itself. *Coolidge v. New Hampshire, supra*, 403 U.S. at pp. 471, 472. This seems at least implicit recognition of the

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6. "It is no answer to say that the police could have obtained a search warrant, for '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.'" *Id*, quoting from *United States. v. Rabinowitz*, 339 U.S. 56, 66 (1950) which overruled *Trupiano v. United States*, 334 U.S. 699 (1948); but see *United States v. United States District Court*, 407 U.S. 297, 315, 318 (1972).

weakness of the inadvertence rationale, for no reason is given for this exception and none is apparent. See 2 La Fave, *supra*, § 4.11(d), p. 355. In all of the foregoing situations, the invasion of privacy and possession is the same. See *Coolidge v. New Hampshire, supra*, 403 U.S. at p. 519 (White, J., concurring and dissenting).

The inadvertence requirement could actually extend, not restrict, intrusions into the home. When, during the initial lawful intrusion, police come upon items for which they could have obtained a warrant, requiring inadvertence prevents only an immediate seizure. No reason appears, however, why the police are "precluded from returning to the magistrate for an additional warrant and returning to seize the [evidence.]" 1 Cook, *supra*, § 3:5, p. 344; see 2 La Fave, *supra*, § 4.11(d), p. 352, fn. 73. Of course, in the meantime, the police must be able to adequately protect the evidence against risk of loss or against any danger to themselves, factors deemed sufficient to excuse the need for a warrant where the discovery was inadvertent.

In *Segura v. United States*, 468 U.S. 796 (1984), the police made an (assumed) unlawful warrantless entry of a residence, arrested and removed the occupants, and remained in the residence for nineteen hours without conducting a search until a search warrant was obtained. The Court held that the search warrant was not tainted by the unlawful entry because the search pursuant to the warrant was based on information wholly unconnected to the illegal entry. *Id*., at pp. 804-805; see *Murray v. United States*, ___ U.S. ___, 108 S.Ct. 2529, 2531-2532 (1988). In the more pertinent part of the *Segura* opinion, signed by two justices, the Court stated "that securing a dwelling, on

the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of the dwelling or its contents." *Id.*, at p. 810. Since the present entry was justified by a valid search warrant, no reason appears why the police could not have secured the premises and obtained a warrant for the unnamed items. Of course, this procedure would prolong the invasion of the premises and, as previously pointed out, protects no privacy or possessory interest of the residents.[7]

The *Coolidge* opinion does not define "inadvertence." 2 La Fave, *supra*, § 4.11(d), p. 351; The Supreme Court, 1970 Term, 85 Harv.L.Rev. 3, 244 (1971). Professor La Fave notes that the common meanings of

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7. In *Murray v. United States, supra*, ___ U.S. ___, 108 S.Ct. 2529, the Court held that evidence seized pursuant to a search warrant obtained after an unlawful entry is tainted if the police "decision to seek the warrant was prompted by what they had seen during the initial entry, or if the information obtained during the entry was presented to the Magistrate and affected his decision to issue the warrant." *Id.*, at pp. 2535-2536, footnote omitted. Since the initial entry and search is lawful in our case, deciding to obtain a warrant and presenting the information obtained carries no such taint. The mere failure to name the items in the first warrant may have been a mistake but it was not unlawful. "[E]xclusion of lawfully discovered evidence should not result from a police failure to demonstrate to the magistrate the maximum intrusion upon the defendant's property which they were then constitutionally entitled to make." 2 La Fave, *supra*, § 4.11(d), p. 354.

the words used in *Coolidge* could mean the Court intended inadvertence to mean oversight, mistake or unintentional ("inadvertent"); considered in advance, foreseen, or expected ("anticipated"); apprehend with certitude as true ("know"); or have in mind a purpose ("intend"). 2 La Fave, *supra*, § 4.11(d), p. 351; *Coolidge v. New Hampshire, supra*, 403 U.S. at p. 470. As previously noted, the Brief for the Petitioner reflects this confusion as he too employs these various words. Ultimately, petitioner equates inadvertence with a lack of probable cause at the time of the initial lawful intrusion. Most courts have so defined "inadvertence." 1 Cook, *supra*, § 3:5, p. 344, fn. 20.

> "If the 'inadvertent discovery' limitation is to make any sense at all, however, it *must* at least mean that a discovery of objects not named in the search warrant is *always* inadvertent, without regard to the personal hopes or expectations of the executing officers, if there were not sufficient grounds to justify the issuance of a warrant which also named those objects as among the things to be seized. In light of the fact that Justice Stewart is not prepared to require the police to return to the magistrate for a second warrant when the discovery was 'inadvertent,' the only plausible explanation for requiring such action in the remaining cases (without regard to the risk that the evidence maybe lost in the interim) is because the police could have (and thus, apparently, should

> have) included the discovered object in the first warrant." 2 La Fave, *supra*, § 4.11(d) at pp. 351-352. Emphasis in original; footnotes omitted.

If this is the correct definition, what possible motive could the police have for not naming these items? Only oversight, carelessness, or miscalculation of probable cause by the police[8/] or magistrate would explain the omission.[9/] *Coolidge v. New Hampshire, supra*, 403 U.S. at p. 517 (White, J., concurring and dissenting). That was plainly the case here, where the deputy district attorney stated at the suppression hearing that the prosecutor who helped draft the warrant failed to ask for permission to search for what normally would have been sought in this case.

There is no advantage to the officer executing the warrant in omitting items as to which probable cause

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8. The Court has held in the context of arrests that the "police are not required to guess at their peril the precise moment at which they have probable cause . . . ." *Hoffa v. United States*, 385 U.S. 293, 310 (1966). No reason appears why they should be at risk when seeking a search warrant.

9. It is well to note that under this definition of "inadvertence," *Coolidge* fosters the anomalous situation where the police will be encouraged to contend that they lacked probable cause and the defendant will be compelled to claim that such cause existed and should have been in the warrant. "Such a scenario would hardly encourage police truthfulness." The Supreme Court, 1970 Term, 85 Harv.L.Rev. 3, 245 (1971); 2 La Fave, *supra*, § 4.11 (d), p. 354.

exists. "Indeed, the opposite may be the case. As a general rule, it will be to the advantage of the officer to have specified in the warrant all items for which probable cause may be show[n], because the longer the list, the longer the duration of the search to locate the items, and the greater the probability that unlisted items will be discovered fortuitously. If, on the other hand, only one or two items are specified, once they have been found the search must cease." 1 Cook, *supra*, §§ 3:5, p. 344.

Petitioner makes much of the fact that Sergeant Larault testified that he was looking for the unnamed items and intended to seize them. He implies that the search for the named rings was a pretext to search for the unnamed seized items.

In *Texas v. Brown, supra*, 460 U.S. 730, a plurality of the Court implied the plain view doctrine may not be relied on only as a pretext, *id*., at p. 737, stating that there was no suggestion that the driver's license checkpoint involved there was a pretext for finding evidence of a narcotics violation. *Id*., at pp. 743-744. The mere generalized expectation that some cars would contain narcotics or paraphernalia did not make the seizure pretextual and noninadvertent. *Id*., at pp. 743-744.

If inadvertence means no pretext as well as no probable cause, the seizures here remain valid. To be sure, Sergeant Larault had probable cause to believe the guns,[10/] shocking device, handcuffs, and coin club evidence

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10. Descriptions of the guns as a machine gun and a small blue steel revolver would have been sufficient to authorize a warrant. The police did not know the makes or serial numbers, nor could they know. To

would be present at petitioner's home. He presented this cause to the magistrate by including in the warrant affidavit the circumstances of the crime. Since Sergeant Larault did seek permission to search for the rings, we cannot fathom why he would use this as a pretext to search for other evidence of the same crime for which he also had probable cause. Of course, this is always true, for when probable cause exists what is the need for pretext? Merely because Sergeant Larault was looking for these unnamed items and intended to seize them did not expand the scope of the search. He did not look beyond the authorized area or duration, finding everything in plain view during his lawful intrusion. Thus, the search was neither exploratory nor pretextual.

Moreover, "[W]hether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officers' actions in light of the facts and circumstances confronting him at the time,' [quoting *Scott v. United States*, 436 U.S. 128, 136 (1978)], and not on the officer's actual state of mind at the time the challenged action was taken." *Maryland v. Macon*, 472 U.S. 463, 470-471 (1985). The Court accepts the notion that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." *Scott v. United States, supra*, 436 U.S. at p. 136 (footnote omitted). "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*

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require such information under the guise of particularity would thwart reasonable police activity. *Quigg v. Estelle*, 492 F.2d 343, 345-346 (9th Cir. 1974).

v. Connor, ___ U.S. ___, 57 U.S.L.W. 4513, 4516 (May 15, 1989); see *Anderson v. Creighton*, 483 U.S. 635, 638-640 (1987); *Malley v. Briggs*, 475 U.S. 335, 344-345 (1986); *Harlow v. Fitzgerald*, 457 U.S. 800, 815-820 (1982). As the Court stated in *United States v. Leon*, 468 U.S. 897, 922, fn. 23 (1984),

> "Although we have suggested that '[o]n occasion, the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule,' *Scott v. United States*, 436 U.S. 128, 139, n. 13, 56 L.Ed.2d 168, 98 S.Ct. 1717 (1978), we believe that 'sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.' *Massachusetts v. Painten*, 389 U.S. 560, 565, 19 L.Ed.2d 770, 88 S.Ct. 660 (1968) (White, J., dissenting)."[11]

Here, Sergeant Larault obtained a search warrant and confined his search to the authorized area and

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11. Ironically, the inadvertence rule would require judicial inquiry into the collective mind of the police to determine who knew what when and whether what they knew furnished probable cause. This also poses great practical problems. For example, what if the affiant officer had probable cause but the executing officer was unaware of it? The objective test avoids these problems without sacrificing privacy.

duration. He seized only items in which petitioner had neither a privacy nor a possessory interest, as he was lawfully in place to observe the items and had probable cause to seize them. Since the search and seizure were unaffected by Sergeant Larault's state of mind, his conduct was objectively reasonable.

While it is true, as petitioner notes, that inadvertence is required by most lower courts, adherence to *Coolidge* is far from universal. California notes its nonbinding plurality status and refuses to follow it. *North v. Superior*, 8 Cal.3d 301, 307-308, 502 P.2d 1305 (1972). Other states have made similar observations. *State v. Mitchell*, 300 N.C. 305, 310-311, 266 S.E.2d 605, 609 (1980), *cert. denied*, 449 U.S. 1085 (1981); *State v. Pontier*, 95 Idaho 707, 712, 518 P.2d 969, 974 (1974); *State v. King*, 191 N.W.2d 650, 655 (Iowa 1971); *State v. Ruscoe*, 212 Conn. 223, 563 A.2d 267, 275-276, fn. 8 (1989); see *State v. Eiseman*, 461 A.2d 369, 380 (Rhode Island 1983). Federal courts are also sensitive to *Coolidge's* uncertain status. *United States v. Bradshaw*, 490 F.2d 1097, 1101, fn. 3 (4th Cir. 1974), *cert. denied*, 419 U.S. 895 (1974); *United States v. Santana*, 485 F.2d 365, 369-370 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974). And, those courts that do require inadvertence often do so only on paper, not in deed. Professor La Fave notes that the lower courts "regularly characterize as 'inadvertent' the discovery of items as to which it appears the police could have made a probable cause showing in advance had it occurred to them to do so." La Fave, *supra*, § 4.11(d), p. 355 (footnote omitted).

"[T]he inadvertence rule is unnecessary to further any Fourth Amendment ends and will accomplish

nothing." *Coolidge v. New Hampshire, supra*, 403 U.S. at p. 517 (White, J., concurring and dissenting). Invalidating seizures because of police oversight or miscalculation of probable cause "seems a punitive and extravagant application of the exclusionary rule." *Coolidge v. New Hampshire, supra*, 403 U.S. at p. 517 (White, J., concurring and dissenting). Requiring a warrant where no privacy or possessory interest remains "is hardly worth . . . the costs inherent in the 'inadvertent discovery' limitation." 2 La Fave, *supra*, § 4.11(d), p. 353. "The weakness of the rationale for the inadvertence rule may explain why it has never been embraced by a majority of the Court." 1 Cook, *supra*, § 3:5, p. 344. The Court should reject this aspect of *Coolidge*.

II

REGARDLESS OF WHETHER SEIZURE OF THE EVIDENCE WAS INADVERTENT, SINCE THAT SEIZURE VIOLATED NO PRIVACY OR POSSESSORY RIGHT AND WAS NOT IMPERMISSIBLE UNDER CLEARLY ESTABLISHED LAW, SUPPRESSION OF THE EVIDENCE IS AN INAPPROPRIATE REMEDY.

Assuming that inadvertence is a requirement for lawful plain view seizures, the evidence seized here should not be suppressed. This Court has repeatedly emphasized the central purpose of the exclusionary rule as deterrence of police misconduct. *United States v. Leon, supra*, 468 U.S. at pp. 906, 908-909; *Stone v. Powell*, 428 U.S. 465, 486 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Peltier*, 422 U.S. 531, 536-539

(1975); *United States v. Calandra*, 414 U.S. 338, 347 (1974). The deterrent purpose of the exclusionary rule assumes the police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right. *Michigan v. Tucker*, 417 U.S. 433, 447 (1974). However, where law enforcement officers act in good faith or their transgressions are minor, the magnitude of the benefit conferred upon guilty defendants offends basic notions of the criminal justice system and may well breed disrespect for the law and administration of justice. *United States v. Leon, supra*, 468 U.S. at p. 908. "Accordingly, '[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.'" *Id.* The nondeliberate (i.e., negligent) omission in this case, made without pretext (i.e., in good faith) amounts to a minor transgression. This negligent omission should not result in the exclusion of evidence. Cf. *Franks v. Delaware*, 438 U.S. 154, 171 (1978) (only showing of deliberate falsehood or reckless disregard for truth will support a subfacial challenge to a search warrant).

This is particularly true where the failure to obtain a warrant for the unnamed items deprived petitioner of no tangible right. Petitioner's privacy interest was invaded to the same degree whether or not the unnamed items were taken, and the probable cause required to seize them protected his possessory interest. Any assumed violation of the Warrant Clause because probable cause existed when the warrant was sought is entirely abstract and theoretical. In short, the same reasons for discarding the inadvertence requirement also militate against

application of the exclusionary rule.

Finally, a police officer is not charged with predicting the future course of constitutional law. *Pierson v. Ray*, 386 U.S. 547, 557 (1967); accord *Procunier v. Navarette*, 434 U.S. 555, 565 (1978). Rather, officers must only know law that was "clearly established at the time an action occurred." *Harlow v. Fitzgerald, supra*, 457 U.S. at p. 818. To be "clearly established," the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected . . . unless the very action in question has previously been held unlawful, [citation]; but it is to say that in the light of preexisting law the unlawfulness must be apparent." *Anderson v. Creighton, supra*, 483 U.S. at p. 640. When the law is "unsettled," whether by reason of the novelty of the question, a conflict of principles, or a disagreement between courts, police officers should not be required to predict which view ultimately will prevail. *United States v. Buck*, 813 F.2d 588, 593 (2d Cir. 1987); *United States v. Mahoney*, 712 F.2d 956, 961 (5th Cir. 1983). Since *Coolidge* is not precedent and California's *North* decision is, Sergeant Larault was entitled to rely on the latter. "[U]nless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm." *United States v. Peltier, supra*, 422 U.S. at p. 542.

REPLY

BRIEF

Supreme Court, U.S.
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No. 88-7164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TERRY BRICE HORTON,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of The State of California, Sixth Appellate District

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

SUMMARY OF ARGUMENT

The Fourth Amendment specifically requires warrants to particularly describe the items to be seized. Where police officers enter a residence with the intent to search for and seize items not described in the warrant, the amendment has been violated. Items are not legitimately in plain view when they are not inadvertently found. Allowing seizures of items not inadvertently found permits police officers to ignore the warrant clause of the Fourth Amendment.

ARGUMENT

IN ORDER TO SEIZE ITEMS IN PLAIN VIEW NOT LISTED ON A WARRANT, THEY MUST BE INADVERTENTLY FOUND

The framers of the Fourth Amendment were concerned with nonspecific or arbitrarily obtained warrants, including warrants that did not name the person to be searched (see *Money* v. *Leach*, 97 Eng. Rep. 1075 (K. B., 1765)); that did not precisely describe the items to be seized (see *Entich* v. *Carrington*, 19 Howell's State Trials 1029, 95 Eng. Rep. 807 (K.B., 1765)); or that were issued on conjecture or suspicion (see M. Smith, *The Writs of Assistance Case* 344 (1978) (citing John Adams in the *Massachusetts Spy* of Apr. 29, 1773)). Consequently, the particularity clause was included in the Fourth Amendment. The framers of the amendment intended at a minimum to protect against improperly issued warrants.

The Fourth Amendment provides that: "No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The words of the particularity requirement of the warrant

clause are "precise and clear," *Stanford* v. *Texas*, 379 U.S. 476, 481 (1964), and thus need no further elaboration. Proceedings for the issuance of a search warrant must be strictly construed and every constitutional and statutory requirement must be observed, or the search and seizure is illegal. *United States* v. *Musgrave*, 293 F. 203 (D. Neb., 1923); *United States* v. *Borkowski*, 268 F. 408 (S.D. Ohio, 1920). A seizure of property is per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a warrant issued upon probable cause and particularly describing the items to be seized. *United States* v. *Place*, 462 U.S. 696 (1983).

This amendment protects two different interests: the interest in retaining possession of property and the interest in maintaining personal privacy. A seizure threatens the former, a search the latter. *Brown* v. *Texas*, 460 U.S. 730, 747 (1983). "Although the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures [citation], neither the one nor the other is of inferior worth or necessarily requires only lesser protection." *Arizona* v. *Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 1154 (1987).

Exceptions to the warrant requirement are "few in number and carefully delineated." *United States* v. *United States District Court*, 407 U.S. 297, 318 (1972). In general, the exceptions to the warrant requirement serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction. Exceptions to the warrant requirement are based on the reasonableness of the police conduct and the location of the conduct. *Terry* v. *Ohio*, 392 U.S. 1 (1968), for instance, bases the reasonableness of the search on the protection of the officer. Exceptions to the warrant

requirement should not be created solely on grounds of effective crime prevention and detection. See *United States* v. *Place*, 462 U.S. 696 (1983). There must be a showing by those who seek the exception that the exigencies of the situation made a warrantless search and seizure imperative. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 455 (1971). Forgetting to include items in a warrant is not a recognized exception to the warrant requirement.

"The warrant clause of the Fourth Amendment is not dead language." *United States* v. *United States District Court*, 407 U.S. at 316. It "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge* v. *New Hampshire*, 403 U.S. at 481. The "police must, whenever practical, obtain advance judicial approval of searches and seizures through the warrant procedure." *Terry* v. *Ohio*, 392 U.S. at 20.

The Fourth Amendment confines an officer executing a warrant strictly within the bounds set by the warrant. *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Police officers must be required to obey the law in enforcing the law. "The duty of giving the [Fourth Amendment] force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." *Marron* v. *United States*, 275 U.S. 192, 195-96 (1927).

The Court should not permit police officers to create the exigency excusing the warrant. In the instant case, there was no exigency, except perhaps that created by the officers' failure to list in the warrant all the items for which they intended to search and to seize. At the start of the search, the officers had the intent to exceed the scope of the warrant authorizing their entrance into petitioner's residence.

In *Maryland* v. *Garrison*, 480 U.S. 79 (1987), this Court held a search reasonable specifically because the officers in that case had no intent to exceed the scope of the warrant. There, the officers reasonably believed that they were searching the premises described in the warrant. Their belief was evidenced by the fact that immediately after they realized their mistake, the search ceased.

It may well be that in the instant case, had the officers included the items in their affidavit for the warrant, the seizure would have been approved by the magistrate. However, because the officers failed to list the items in the affidavit, there was no warrant for their seizure. The officers acted without a warrant. "[T]his Court 'has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end.'" *United States* v. *United States District Court*, 407 U.S. at 318 (citing *Katz* v. *United States*, 389 U.S. 347, 356-57 (1967)).

California asserts that the items not listed in the warrant were in plain view and thus the seizure should be allowed. However, "plain view alone is never enough to justify the warrantless seizure of evidence." *Coolidge* v. *New Hampshire*, 403 U.S. at 468. As the *Coolidge* plurality observed, "it is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure," simply as "the normal concomitant of any search, legal or illegal." *Id.* at 465. Thus, in order to seize an item in plain view, it must be inadvertently found.

Police officers should not be permitted to plan a plain view. Where the officers intend to search and seize items,

those items must be listed in the warrant. The police cannot intend to search for items not particularly described in the warrant. To seize items not listed in the warrant, they must be inadvertently found. Any other rule would result in the nullification of the particularity requirement of the Fourth Amendment.

This rule does not create a cost on efficient law enforcement. It is the Fourth Amendment itself which imposes limits on police officers. The inadvertence rule simply states that because the Fourth Amendment requires that the items to be seized be particularly described in the warrant, police officers may not intentionally search for and seize items not described in the warrant. To seize items not particularly described in the warrant, they must be inadvertently found. This requirement is nothing more than a restatement of the mandate of the Fourth Amendment.

The inadvertence rule makes planned searches and seizures without a warrant impossible. A rule allowing seizures of items not listed on a warrant, not inadvertently fund, would wholly abrogate the particularity requirement of the Fourth Amendment. The Fourth Amendment is not "a mere technicality or a nuisance to be avoided." *Katz* v. *United States*, 389 U.S. at 559 n.63.

United States v. *Leon*, 468 U.S. 897 (1984), left untouched the various requirements for a valid warrant. *Id.* at 923. There, this court stated: "The good faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment." *Id.* at 924. Police officers cannot rely on a facially deficient warrant. A warrant is facially deficient where it fails to describe the items to be seized.

The failure to include all items in the warrant for which the police intend to search and seize was not objectively reasonable. The warrant did not particularly describe the items seized from petitioner's home. The officers executing the warrant could not reasonably presume the seizures were made pursuant to that warrant. The failure to list the items in the warrant was not the mistake of the magistrate, it was the police officer who failed to procure a warrant particularly describing the items to be seized. At the time of the search, the officers intended to exceed the scope of the warrant by searching for and seizing items not listed in the warrant. The Court should not condone a deliberate bypass of the warrant clause of the Fourth Amendment.

Unless the Constitution is amended to omit the particularity requirement, police officers must obtain warrants particularly describing the items for which they intend to search and seize. Warrantless seizures of items in plain view not inadvertently found permits officers to ignore the particularlity requirement of the Fourth Amendment. Allowing officers to seize items not listed in the warrant, not inadvertently found, will "reduce police officers' professional incentives to comply with the Fourth Amendment, [and] encourage them to repeat their mistakes." *United States* v. *Leon*, 468 U.S. at 918.

This Court should once and for all declare that in order to seize an item in plain view, it must be inadvertently found. The judgment in the instant case should be reversed.

CONCLUSION

For all of the foregoing reasons and for the reasons argued in the Brief for the Petitioner, the judgment of the California Court of Appeal, Sixth Appellate District, should be reversed.

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AMICUS CURIAE

BRIEF

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No. 88-7164

In the Supreme Court of the United States

OCTOBER TERM, 1989

TERRY BRICE HORTON, PETITIONER

v.

STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA FOR THE SIXTH APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

While executing a search warrant at petitioner's house, the police seized items found in plain view that they had probable cause to believe was evidence of a crime. The question presented is whether that seizure was prohibited by the Fourth Amendment because the police suspected that the items would be found in the house, but did not ask the judge to include those items in the search warrant.

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In the Supreme Court of the United States

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No. 88-7164

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STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA FOR THE SIXTH APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents an issue raised but not resolved in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971): whether the police may seize items found in plain view during the course of a search only if those items are discovered "inadvertently." Federal law enforcement agents execute many search warrants and often discover evidence in plain view. At times, those agents discover evidence that they suspected would be present but did not include in the application for the warant. The resolution of the question presented

in this case will determine whether federal agents may lawfully seize such evidence and whether it may be admitted into evidence in federal criminal proceedings. This case will also determine whether evidence seized in the course of state searches under similar circumstances may be used in federal prosecutions.

STATEMENT

1. Erwin Wallaker was the treasurer of the San Jose Coin Club in California. In January 1985, the Coin Club held its annual coin show at the San Jose Convention Center. One of Wallaker's jobs was to collect the revenue generated at the show. On January 13, 1985, Wallaker left the convention center with about $10,000 in cash in one briefcase, coins worth $20,000 in another briefcase, and $1,200 in his wallet. Wallaker drove home at about 6:30 that night. J.A. 44.

When Wallaker reached his home, he left his car in his driveway and walked into his garage where he was surprised by two men wearing masks. One man held a machine gun; the other carried a "stun gun." The man with the machine gun demanded money while the other man shot Wallaker with the stun gun. The robbers forced Wallaker to the floor and handcuffed him. J.A. 44.

Wallaker tried to keep the two men talking because he noticed that the man with the machine gun had a southern accent that sounded familiar. The man with the stun gun took three rings from Wallaker's fingers, as well as his billfold and credit-card case. The man with the machine gun then asked Wallaker for the rest of his money. Wallaker pointed to a safe, and one of the assailants removed its

contents—several rings, uncut rubies, and a wristwatch. At one point, the man with the stun gun rubbed it against Wallaker's face. J.A. 44-45.

The robbers then found Wallaker's car keys and went to his car. Wallaker made noises in an effort to attract help. One of the robbers then returned to the garage, hit Wallaker over the head, and dragged him back away from the garage door. Three neighbors soon responded to Wallaker's calls for help and called the police. The robbers were making their escape when the neighbors came to Wallaker's aid. J.A. 45.

In the early morning after the robbery, Wallaker realized that he recognized the voice of the man with the southern accent as that of Terry Horton, a fellow coin collector. Wallaker had seen Horton at coin meetings over the years and had spoken with him about two dozen times. He had noticed that Horton attended the coin show on the day of the robbery. Wallaker promptly contacted the police and gave them that information. He then made a positive identification of Horton from a mug shot. Later, Lisa Miller—one of the people who came to Wallaker's aid—picked Horton from a photo array as the man she saw walking hurriedly from Wallaker's house. J.A. 46-47.

On the basis of that evidence, the San Jose police decided to seek a warrant to search Horton's house. Sergeant Gary LaRault completed an affidavit in support of the warrant. The affidavit described the evidence against Horton. Sergeant LaRault also stated that his experience showed that "robbers take the property stolen from their victims to the robbers' place of residence." J.A. 2-3. Accordingly, Sergeant LaRault requested a warrant to search Horton's

house for the property taken by Wallaker's robbers. J.A. 4. A municipal court judge issued the warrant authorizing the search of Horton's house for the proceeds of the robbery. J.A. 13-14.

The San Jose police executed the search warrant on January 30, 1985. They found none of the property that had been stolen from Wallaker. In the course of the search for the stolen property, however, the police found in plain view the following evidence linking petitioner to the robbery: an Uzi machine gun, a blue-steel .38 caliber revolver, two stun guns, a set of handcuff keys, an advertisement for the San Jose Coin Club show, and some clothes. J.A. 19-24. Petitioner was arrested and charged with robbery, false imprisonment, possession of a concealable firearm by a convicted felon, and possession of an Uzi machine gun. J.A. 47.

2. On September 23, 1985, the trial court heard evidence on petitioner's motion to suppress the evidence found in his house. Sergeant LaRault, who executed the warrant to search petitioner's house, testified at the hearing. He stated that, in accordance with the warrant, he "was looking for items that were taken from Mr. Wallaker during the robbery." J.A. 28. He added that he was also interested in "items that would connect the person at the home to associate with the robbery, things used in the robbery to obtain the property, weapons mentioned in the police reports, the clothing described by the witnesses." J.A. 28.

The trial court denied petitioner's request to suppress the evidence seized from his house. A jury later found petitioner guilty on all charges. Petitioner was sentenced to a prison term of eight years and eight months.

3. The California Court of Appeal affirmed petitioner's convictions, rejecting petitioner's claim that the evidence from his home was seized in violation of the Fourth Amendment. J.A. 43-77. Petitioner had argued that the seizure of the evidence could not be justified under the "plain view" doctrine because the officer's discovery of the items was not "inadvertent." J.A. 52. Relying on *North* v. *Superior Court*, 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972), the court of appeal held that there is no " 'inadvertence' requirement in California." J.A. 53. In *North*, the Supreme Court of California had rejected Justice Stewart's view in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), that the "plain view" doctrine applies only to evidence that is discovered "inadvertently." Accordingly, the court of appeal concluded that " '[t]he fact that the officer had foreknowledge of the presence of the evidence in [petitioner's house] is of no constitutional significance.' " J.A. 53 (citation omitted).[1]

The Supreme Court of California denied petitioner's request for review. J.A. 78.

INTRODUCTION AND SUMMARY OF ARGUMENT

The suggestion that the Fourth Amendment imposes an "inadvertence" requirement for seizures of items found in plain view stems from a three-page segment of Justice Stewart's opinion in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Justice Stewart wrote in *Coolidge* that the "discovery of evidence in plain view must be inadvertent" in order to justify its seizure. 403 U.S. at 469. The "inad-

[1] The court of appeal also held that the police had probable cause to seize the evidence from petitioner's house. J.A. 53-54. Petitioner does not challenge that ruling in this Court.

vertence" requirement, he explained, provides that "where the police know in advance the location of the evidence and intend to seize it," they must obtain a warrant that authorizes them to search for and seize that evidence. 403 U.S. at 470.[2]

Justice Stewart explained that when the police know of the existence of incriminating items in advance and intend to seize them, it imposes "no inconvenience whatever, or at least none which is constitutionally cognizable" to require that the police obtain a warrant to seize those items. 403 U.S. at 470. Not to include those items in the warrant that authorizes the entry, he stated, would violate the Warrant Clause of the Fourth Amendment, which requires that warrants particularly describe the things to be seized.

Justice Stewart's analysis did not rest entirely on the Warrant Clause, however. He explained that even when the initial intrusion is justified by one of the exceptions to the warrant requirement, such as hot pursuit or search incident to arrest, the plain view seizure of items that the police knew in advance they would find "would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure." 403 U.S. at 471. Justice Stew-

[2] Although Justice Stewart did not expressly say so, the courts have generally concluded, and petitioner agrees (Br. 10), that the test for inadvertence should be probable cause, *i.e.*, a seizure is not inadvertent if the police had probable cause to believe the items in question were subject to seizure and would be found on the premises in question. Any lower standard would lead to an absurd result: the police would be foreclosed from seizing items that they had not sought a warrant to seize, even though if they had sought a warrant, they would not have been able to obtain it for lack of probable cause.

art recognized an exception to his "inadvertence requirement" for "contraband or stolen goods or objects dangerous in themselves," 403 U.S. at 471, 472, although he did not explain the analytical basis for that exception.[3]

That part of Justice Stewart's opinion in *Coolidge* did not command a majority of the Court. Four Members of the Court forcefully disagreed with Justice Stewart, see 403 U.S. at 508-510 (Black, J.); *id.* at 516-517 (White, J.), and Justice Harlan expressly limited his concurrence in Justice Stewart's opinion to portions other than Part II-C, which contained the discussion of the inadvertence requirement, see *id.* at 491.[4]

In his dissent, Justice Black argued that the Warrant Clause, on which Justice Stewart principally based the inadvertence requirement, has no role to play in limiting probable cause seizures of items seen in plain view at the time of an arrest. 403 U.S. at

[3] Justice Stewart may have regarded the inadvertence requirement as inapplicable to those items because of exigency (in the case of contraband and dangerous objects) and the reduced possessory interest of the subject of the search (in the case of contraband and stolen goods).

[4] Justice Harlan did not explain the precise grounds for his concurrence in the judgment. His concurrence in Part II-D of Justice Stewart's opinion (but not the other portions of Part II) may reflect the view that the seizure of Coolidge's car, which was parked in his driveway, involved an intrusion onto a portion of Coolidge's property that was not justified by the officers' presence in Coolidge's house to arrest him, and therefore the seizure of the car was not justified under the plain view doctrine, the rules applicable to car searches, or the principles governing searches incident to arrests. Portions of Part II-D of Justice Stewart's opinion, in which Justice Harlan joined, are consistent with that view of the case. See 403 U.S. at 478, 484.

505-510. Moreover, Justice Black observed that Justice Stewart's approach seemed to reject the reasonableness requirement of the Fourth Amendment in favor of an unwarranted per se rule that "if the police could have obtained a warrant and did not, the seizure, no matter how reasonable, is void." 403 U.S. at 509.

Justice White made a broader attack on the inadvertence requirement, not limiting his dissent to seizures made at the time of an arrest. He began his analysis by stating that, in his view, the warrantless seizure of evidence seen during an otherwise lawful search "is not itself an invasion either of personal privacy or of property rights beyond that already authorized by law. Only the possessory interest of a defendant in his effects is implicated." 403 U.S. at 515. Justice White noted that under Justice Stewart's approach a warrantless seizure of property seen during a valid warrant-authorized search is lawful if the discovery of the evidence is inadvertent. Justice White questioned why the case should be different when the discovery of the evidence is anticipated. If police believe they have probable cause to seize particular evidence, he explained, they "could have no possible motive" for including certain items and omitting others, with the hope of seizing the second group of items under the plain—view doctrine. Only a misjudgment by the police of the probable cause for the second group of items, or oversight on their part, would explain the failure to include those items in the warrant application. And to suppress evidence because of that kind of misjudgment or oversight, Justice White concluded, would be "a punitive and extravagant application of the exclusionary rule." 403 U.S. at 517.

Justice White further noted that "the inadvertence rule is unnecessary to further any Fourth Amendment ends and will accomplish nothing." 403 U.S. at 517. Police with a warrant to search for a particular item may search only where they can reasonably expect to find that item, and they must terminate the search once the item is found. Thus, Justice White explained, the inadvertence rule "will in no way reduce the number of places into which they may lawfully look." *Ibid.* Instead of promoting the goals of the Fourth Amendment, Justice White concluded, the inadvertence requirement "will merely attach undue consequences to what will most often be an unintended mistake or a misapprehension of some of this Court's probable-cause decisions, a failing which, I am afraid, we all have." 403 U.S. at 518.[5]

Since the decision in *Coolidge*, many courts have accepted the inadvertence requirement as law. See, *e.g.*, *Terry* v. *State*, 271 Ark. 715, 610 S.W.2d 272 (Ct. App. 1981); *State* v. *Galloway*, 232 Kan. 87, 652 P.2d 673 (1982). Other courts, however, have ruled that the Fourth Amendment contains no such

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[5] Justice White illustrated his point with a telling hypothetical case. He posited a warrant-authorized search for a rifle, during the course of which the police discovered two photographs of the murder victim. He further posited that the police anticipated that they would find one of the photographs, but not the other. He then argued that the seizure of the two photographs implicated Fourth Amendment interests in exactly the same way: the seizure deprived the owner of possession of both photographs based on the police judgment that they had probable cause to seize them. There is no justification under the policies of the Fourth Amendment, he argued, to suppress the photograph that the police had expected to find, but not the other.

requirement. See, *e.g.*, *North* v. *Superior Court*, *supra*; *State* v. *Romero*, 660 P.2d 715 (Utah 1983). And many of the courts that have adopted an inadvertence requirement have narrowly construed it, finding that particular discoveries were "inadvertent" and thus lawful. See, *e.g.*, *United States* v. *$10,000 in U.S. Currency*, 780 F.2d 213, 219 (2d Cir. 1986) (seizure of money at premises was proper even though there was pre-existing probable cause, because police "in good faith failed to mention [the money] in the warrant"); *United States* v. *Wright*, 641 F.2d 602, 605 (8th Cir. 1981) (discovery of gun during execution of warrant for drugs deemed inadvertent even though "the officers probably expected to find a firearm * * * and in fact might have been able to obtain a search warrant for a firearm").

Thus, contrary to the implication in petitioner's brief (Br. 8-9, 13), Justice Stewart's opinion in *Coolidge* is not settled law. Rather, it is simply "the point of reference for further discussion of the issue." *Texas* v. *Brown*, 460 U.S. 730, 737 (1983) (plurality opinion). This case brings squarely before the Court the question whether the inadvertence requirement is needed to comply with "[t]he fundamental command of the Fourth Amendment * * * that searches and seizures be reasonable." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985). To answer that question, the Court should weigh any benefits of that requirement against its costs to "legitimate governmental interests." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (quoting *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983)).

We agree with the position articulated by Justice White in the *Coolidge* case: the inadvertence requirement does little or nothing to promote Fourth Amendment values, and it imposes significant costs on legitimate law enforcement efforts. In circumstances where an officer conducting a valid warrant-authorized search effects a plain-view seizure, no Fourth Amendment value is infringed; the search may not extend beyond that authorized by the warrant, and the seizure must be based on probable cause. The scope of the search therefore cannot be broadened by the omission from the warrant of evidence the police expect to find.

The inadvertence requirement would impose several costs on efficient law enforcement. It would require the police either (1) to seek an additional warrant to seize items found during a search when the police find items they anticipated finding, or (2) to include in the warrant application any items they expect to find during the search. If they follow the latter course, the police will have an obligation to include in the warrant application all items that they have probable cause to connect to the crime and to believe will be on the premises. In light of the uncertainties unavoidably surrounding the concept of probable cause, complying with that requirement will not be easy. The police will have to guess what a court would later find to constitute probable cause, with suppression as the penalty for guessing wrong.

Contrary to the suggestion of some courts, the inadvertence requirement is not justified by the need to avoid "subterfuge searches." To begin with, officers with probable cause to search for particular items (who are the only ones affected by the inadvertence requirement) will have no reason to conduct "subterfuge searches," instead of simply including the items in question in the warrant application. In

any event, if subterfuge searches are a problem, the issue should be addressed directly, rather than through the creation of a doctrine that may discourage some subterfuge searches, but also affects many searches, such as the one here, that have no element of subterfuge. The inadvertence requirement is, in sum, not justified by the language of the Fourth Amendment or any policy underlying it; it should not be engrafted onto Fourth Amendment analysis.

ARGUMENT

THE FOURTH AMENDMENT ALLOWS THE POLICE, ACTING ON PROBABLE CAUSE, TO SEIZE EVIDENCE THAT THEY FIND IN PLAIN VIEW WHILE LAWFULLY EXECUTING A SEARCH WARRANT

A. The Inadvertence Requirement Does Not Provide Added Protection For Fourth Amendment Values

1. This Court has consistently recognized that "the principal object of the Fourth Amendment is the protection of privacy rather than property." *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967). And the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States District Court*, 407 U.S. 297, 313 (1972). See also *Welsh* v. *Wisconsin*, 466 U.S. 740, 748 (1984).

The requirement of a search warrant, issued by a detached magistrate after a finding of probable cause, adequately protects a person's legitimate privacy interest in his home. The warrant ensures that a judicial officer has examined the evidence and found the existence of probable cause. In addition, the warrant limits the scope of the search; the police may search only in those places where the items listed in

the warrant may reasonably be found. Finally, law enforcement officers must end their search when they have found and seized the items enumerated in the warrant. See *United States* v. *Ross*, 456 U.S. 798, 820-821 (1982); *Coolidge* v. *New Hampshire*, 403 U.S. at 517 (White, J., dissenting); 2 W. LaFave, *Search and Seizure* § 4.10(d), at 329-330 (2d ed. 1987).

In this case, there is no dispute that the police were properly executing a valid search warrant when they found the evidence of petitioner's crime. They were therefore lawfully entitled to be where they were when they saw the evidence in plain view. Consequently, petitioner's privacy interests were not compromised by the fact that the seized evidence was not listed in the search warrant. See W. LaFave, *supra*, § 4.11, at 353.

In seeking to justify the inadvertence requirement, petitioner focuses not on the Fourth Amendment's prohibition against unreasonable searches, but on its prohibition against unreasonable seizures. But like Justice Stewart's opinion in *Coolidge*, 403 U.S. at 471, petitioner's analysis (Pet. 7-8) is based on what we submit is a faulty premise—that seizures are presumptively unreasonable if not made pursuant to a warrant.

Although the Court has never expressly so held, we believe that the analysis in many of the Court's decisions leads to the conclusion that a Fourth Amendment seizure, as distinguished from a search, ordinarily does not require a warrant. Instead, a seizure is valid as long as it is supported by probable cause, and as long as the seizure can be made without the

need for an unauthorized intrusion.[6] See *Payton* v. *New York*, 445 U.S. 573, 586-587 (1980) (it is well settled that "objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity."); *G. M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977); see also *United States* v. *Jacobsen*, 466 U.S. 109, 121-122 (1984) ("it is well settled that it is constitutionally reasonable for law enforcement officer to seize 'effects' that cannot support a justifiable expectation of privacy without a warrant, based on probable cause to believe they contain contraband"); *Illinois* v. *Andreas*, 463 U.S. 765, 771 (1983) (seizure authorized if officer has some prior Fourth Amendment justification for presence and

[6] The distinction the Court has drawn between searches and seizures responds to the different interests the two procedures affect. A search involves an interference with a person's legitimate expectations of privacy. Because "the ruptured privacy of the victims' homes and effects cannot be restored," *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965), law enforcement officers are generally required to secure a warrant before they may conduct a search. A seizure, by contrast, represents only an interference with an individual's possessory interest in property. See *Illinois* v. *Andreas*, 463 U.S. 765, 771 (1983) ("once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost; the owner may retain the incidents of title and possession but not privacy"). The consequences of an erroneous seizure—deprivation of possession of the property—are not nearly as severe as the consequences of an erroneous search, and they are remediable by ordering restoration of unlawfully seized property to the owner. See Fed. R. Crim. P. 41.

"has probable cause to suspect that the item is connected with criminal activity"); *Texas* v. *Brown*, 460 U.S. at 738-739 (plurality opinion) (in light of competing interests, "our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately"); *id.* at 748 (Stevens, J., concurring in judgment).

These decisions establish that as long as the police are authorized to be in the place where they see particular items in plain view, they may seize those items if they have probable cause to believe the items are evidence of a crime. This Court has applied that principle to a boat seized on public waters, *United States* v. *Lee*, 274 U.S. 559, 562 (1927), a car found on a public street, *Cooper* v. *California*, 386 U.S. 58, 61-61 (1967), and items found in a private place where a third party has given consent to search, *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969). The fact that the police are conducting a search when they make their plain-view observations does not alter the analysis. The officers' "viewing of the object in the course of a lawful search is as legitimate as it would have been in a public place * * *." *Arizona* v. *Hicks*, 480 U.S. 321, 327 (1987).[7]

[7] To be sure, the Court has on occasion stated that the Fourth Amendment ordinarily requires a warrant to support a seizure as well as a search. See, *e.g.*, *United States* v. *Place*, 462 U.S. 696, 701 (1983). While there appears to be some tension between the language in cases such as *Place* and the language in the cases cited in the text, the "general rule" that the Court identified in *Place*, is, at minimum, subject to exceptions based on "recognized exception[s] to the warrant requirement," *ibid.*, which include cases in which evidence is observed in plain view during a warrant-authorized search.

The inadvertence requirement is sometimes said to protect a person's possessory interest in items by requiring a judicial officer, rather than the police, to make the finding of probable cause before such items are seized. But the inadvertence requirement does not serve that function well.

This point can be illustrated by the following example. Suppose the police have probable cause to believe that a murder weapon is in the suspect's house, but they also expect to find a mask there that was worn by the murderer. Under petitioner's view of the inadvertence rule, the police would be required to ask the magistrate to issue a warrant allowing them to search for and seize both the weapon and the mask. If the magistrate found probable cause to believe both that the mask was evidence of a crime and that it would be found at the house, the magistrate would issue a warrant listing both items. If the police then found the mask during their search, they could lawfully seize it.

Suppose that the magistrate found probable cause to search only for the weapon, either because the magistrate did not believe the mask would be found in the house or because he did not believe the mask was evidence of the crime. The magistrate's decision to limit the warrant, we submit, would provide little or no protection to the suspect. If, during the course of the authorized search for the weapon, the police found the mask, they could still seize the mask under the plain view doctrine, at least in most cases. If the basis for the magistrate's judgment was that the mask was not likely to be found in the house, the discovery of the mask would obviously supersede that judgment. And even if the basis for the magistrate's judgment was that the mask was not shown to be

evidence of the crime, the police could still seize the mask if events during the search gave the police additional information that buttressed the probable cause tying the mask to the crime. If, for example, the mask were discovered in close proximity to weapons used in the crime, the showing of probable cause might be sufficient to justify the seizure of the mask in spite of the magistrate's refusal to authorize its seizure based on the evidence presented prior to the search.

Even if the circumstances leading to the discovery of the mask do not strengthen the connection between the mask and the crime, the police still may be authorized to seize the mask. If we are correct that seizures ordinarily may be conducted on probable cause without the need for a warrant, the police would not be barred from seizing the mask because of the magistrate's determination that probable cause was lacking; the police could simply seize the mask because they disagreed with the magistrate with regard to the existence of probable cause. If a reviewing court later decided that the police were right and the magistrate was wrong about the existence of probable cause, the reviewing court would hold the evidence admissible, since the court's decision would establish that the probable–cause seizure was lawful.

If the Court concludes that a seizure ordinarily requires a warrant, the police will not be allowed to disregard the magistrate's determination that there is no probable cause to seize the mask. In that setting, the subject of the search could benefit from the inadvertence requirement, because the magistrate's probable–cause determination will restrain the ability of the police to conduct a seizure. But the cases in which that benefit is felt will be sufficiently rare

that the protection provided by the inadvertence requirement will be quite limited. To return to the hypothetical case discussed above, the police will be foreclosed from seizing the mask only if (1) they believe they have probable cause to connect the mask to the crime and to expect that the mask will be found on the premises (and therefore conclude that they are required by the inadvertence rule to ask the magistrate to issue a warrant for the mask as well as the murder weapon); (2) the magistrate agrees with the police with respect to the murder weapon, but disagrees that there is probable cause to connect the mask to the crime and refuses to authorize its seizure for that reason; (3) the mask is found in plain view in the course of the search; and (4) the police learn nothing in the course of the search that buttresses the inference that the mask is connected to the crime.

Obviously, the class of cases fitting this pattern will not be large. In particular, where the police conclude that they are compelled by the existence of probable cause to request authorization to seize a particular item that they would not otherwise have included in the warrant application, their judgment as to the existence of probable cause for that item is likely to be conservative; it is unlikely in that setting that the magistrate will conclude that there is no probable cause to seize the item. Thus, even if the inadvertence requirement induced the police in every case to include in their warrant applications everything they expected to find during the course of a warrant-authorized search, it would have little effect in protecting possessory interests in property that the police find in plain view.

Even though the inadvertence requirement will seldom affect the outcome of a search, it still might

have value if it responded to a serious Fourth Amendment problem. But the inadvertence requirement does not address any recognized law enforcement abuse. It is, rather, a solution in search of a problem. As Justice White pointed out in his dissenting opinion in *Coolidge*, 403 U.S. at 517, police who have probable cause to search for two items can have no possible motive for deliberately including one but not the other in the warrant application. Police are not likely to omit an item from a warrant application so that they can seize it under the plain view doctrine rather than under authority of the warrant. Rather, when the police wish to seize a particular item but omit it from their warrant application, the omission is most often the result of an oversight or an underestimate of the degree of probable cause. In neither event is the target of the search likely to be prejudiced by the omission of the item in question, since the scope of the authorized search is not enlarged, and it is unlikely that a seizure will take place that could not otherwise have occurred.

2. Petitioner's proposed rule—one that would prevent the police from seizing items without a warrant if they anticipated that they would find such items—could actually lead to greater invasions of privacy. To comply with such a rule, the police could follow one of two courses of action. First, when they discover an item they expected to find but did not list, they could remain on the premises while one officer returned to the magistrate to obtain a new warrant. Such a procedure would require the officers to extend their stay on the premises and thus would result in an added invasion of privacy. See generally *United States* v. *Place*, 462 U.S. 696, 709 (1983) ("the

brevity of the invasion of the individual's Fourth Amendment interests is an important factor").

Alternatively, the police could seek broad warrants that would list every item that they expect to find in the place to be searched. That course would avoid the risk that evidence would be suppressed if the defendant could later show that the police had probable cause to search for certain items but did not include them in the warrant application. That course, however, would call on the police to seek permission to search for any item for which they could conceivably have probable cause. The scope of the authorized search, and thus the degree of the intrusion into the subject's privacy, would be enlarged with every additional item listed in the warrant. In sum, it is far from clear that the inadvertence requirement would do anything to further privacy values protected by the Fourth Amendment, and in fact it might tend to produce the opposite effect.

B. The Inadvertence Requirement Would Impose Significant Costs On Legitimate Law Enforcement Activities

In his opinion in *Coolidge*, Justice Stewart concluded that there were no significant costs associated with an inadvertence requirement. See 403 U.S. at 470 ("[t]he requirement of a warrant to seize imposes no inconvenience whatsoever"). Experience, however, has shown that Justice Stewart was wrong. As Professor LaFave has observed, there are a variety of "costs inherent in the 'inadvertent discovery' limitation." LaFave, *supra*, at 353.

In the first place, the criminal justice system would bear obvious costs if the police were required to return to a magistrate for a new warrant listing items that they find in plain view. As the Court observed in *Arizona* v. *Hicks*, there is both "the inconvenience and the risk—to themselves or to the preservation of the evidence—of going to obtain a warrant." 480 U.S. at 327. Those costs are, in general, sufficient to justify warantless seizures of items found in plain view if there is probable cause to seize them. See pp. 14-15, *supra*.

The burden of the inadvertence rule is not avoided even if the police initially list in the warrant application all items as to which they believe they have probable cause. The affiant seeking the warrant would be required to check with other officers involved in the investigation to ensure that every item that any member of the investigative team may expect to find on the premises is listed. Correspondingly, the magistrate would have to engage in the lengthy process of determining whether there is probable cause to search for all items that the police have brought to his attention. That task would be made especially difficult since the police would be ogliged to request search authorization even for items as to which they have only marginal probable cause to believe they will find on the premises.

Perhaps the greatest cost of the inadvertence requirement results from the unavoidable difficulties in applying the concept of probable cause. The existence of probable cause is not an empirical and observable fact. It is a judgment about probabilities that the police (and the magistrate) must make in light of the historical facts. See generally *Illinois* v. *Gates*, 462 U.S. 213, 231 (1983) ("The process does not deal with hard certainties, but with probabilities."). Accordingly, the police cannot be expected to know with certainty whether they have probable cause to search for a particular item; or, put another way, they cannot be expected always to anticipate with

accuracy how a judge will assess the matter at a subsequent suppression hearing.

This Court has stated that "[t]he police are not required to guess at their peril the precise moment at which they have probable cause." *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966). Petitioner's proposal, however, would create just such peril. If a careful and diligent policeman thought that he did not have probable cause to believe a particular item would be found on the premises, but a judge later disagreed, then under petitioner's proposed rule the evidence would be suppressed. In essence, the policeman's cautious approach to warrant-authorized searches would be penalized.[8]

[8] The test for probable cause is ordinarily characterized as an objective one, because "[w]hether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time.'" *Maryland* v. *Macon*, 472 U.S. 463, 470 (1985) (quoting *Scott* v. *United States*, 436 U.S. 128, 136 (1978)). Even if the court adopted a "subjective probable cause" test for the inadvertence requirement, so that evidence would be suppressed only if the searching officers subjectively believed that they had probable cause to search for certain items that were not named in the warrant, the standard would pose serious difficulties. First, in a case involving several officers, it would raise a question of which officer's subjective beliefs should be consulted. Second, it would likely give rise to litigation over the bona fides of the officer's testimony as to his beliefs, as well as challenges to the reasonableness of those beliefs. Third, it would still penalize the cautious officer who, while believing that he had probable cause to search for particular items, decided not to request authorization to search for those items because he regarded the likelihood that those items would be found on the premises to present a close question.

Commentators have also observed that the inadvertence requirement creates "troublesome practical problems of proof at suppression hearings." LaFave, *supra*, at 353 (citation omitted). Those problems result from the fact that in order to satisfy the inadvertence requirement, the government must prove that at the time they applied for the warrant, the police did *not* have probable cause to search for a particular item that they later seized in plain view based on probable cause. The defendant, by contrast, is required to prove that the officers had ample probable cause to believe that incriminating evidence would be found; that claim may be awkwardly inconsistent with the claim that the government did not have probable cause to obtain a warrant in the first place.

The effect of this odd allocation of burdens is not simply to discomfit counsel by forcing them to play unaccustomed roles in the litigation. It creates an incentive for the police to claim a lack of knowledge about important facts in order to downplay the extent of their confidence that they would find particular items of evidence in the searched premises. As Professor LaFave notes, "[s]uch a scenario" is not "any more likely to result in accurate factfinding than hearings under other rules which make it advantageous to the policeman to claim a lack of knowledge." LaFave, *supra*, at 354.

At bottom, the inadvertence requirement would result in the declaration of police conduct as unlawful and the suppression of valuable evidence for no good reason. Of course, the costs might be viewed as justified if the inadvertence requirement significantly advanced Fourth Amendment values, but it does not have that effect. As we have explained, the inadvertence requirement does not protect privacy interests

at all, and it protects possessory interests, if at all, only to a very limited degree. For these reasons, therefore, we submit that the inadvertence requirement should be rejected. Its recognition is not compelled by the language of the Fourth Amendment; neither is its judicial creation justified by the policies advanced by the Fourth Amendment, inasmuch as its costs to law enforcement far exceed any benefits it may provide in protecting against unlawful police conduct.

C. The Inadvertence Requirement Is Not Needed To Prevent Subterfuge, Warrantless, Or General Searches

1. Some courts have interpreted Justice Stewart's opinion in *Coolidge* as directed at preventing "subterfuge searches." See, *e.g.*, *State* v. *Kelsey*, 592 S.W.2d 509, 513 (Mo. Ct. App. 1979). Those courts suggest that the inadvertence requirement was created to address cases like the following: the police want to search for evidence of crime A, but they do not have probable cause, so they obtain a warrant to search for evidence of unrelated crime B. In such a case, the warrant for evidence of crime B is simply a pretext and thus the police are not executing the warrant "in good faith." *State* v. *Van Beek*, 87 S.D. 598, 602, 212 N.W.2d 659, 662 (1974). Accord *United States* v. *Tanquillo*, 330 F. Supp. 871 (M.D. Fla. 1971). Courts embracing that justification for the inadvertence requirement hold that such "subterfuge searches" are unlawful under the Fourth Amendment. See, *e.g.*, *State* v. *Lair*, 95 Wash. 2d 706, 630 P.2d 427, 434 (1981) ("If the search warrant for marijuana is merely a 'pretext' for a search for other drugs or even other kinds of objects, the search may be invalidated.").

There is good reason to doubt that such so-called "subterfuge searches" are unreasonable. This Court has repeatedly held that objective rules govern the inquiry into the lawfulness of a search or seizure, and that an officer's subjective intent does not invalidate objectively reasonable police conduct. In *Scott* v. *United States*, *supra*, for example, the Court stated that searches are to be examined "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." 436 U.S. at 138. Accord *United States* v. *Robinson*, 414 U.S. 218 (1973) (motivation of officer who conducts a search incident to an arrest is irrelevant). That principle suggests that subterfuge searches are not proscribed by the Fourth Amendment as long as they are objectively reasonable.

There is no need, however, to address the broad question of the validity of so-called "subterfuge searches" in order to reject the inadvertence requirement. In the first place, the inadvertence requirement would not prevent subterfuge searches of the type described above. If the police do not have probable cause to search for evidence of crime A, the inadvertence ruie would not require them to refer to that evidence in the warrant application relating to crime B. And even if the inadvertence rule might in some instances discourage the use of subterfuge searches, it is much too crude a device to be effective in achieving that end. Besides discouraging some subterfuge searches, the inadvertence requirement would threaten many searches bearing none of the indicia of subterfuge, such as the search in this case.

The officers in this case executed the search warrant in "good faith" in the sense that they were searching for evidence linking petitioner to the robbery, specifically the fruits of the crime. See J.A.

28. Thus, the searching officers were not engaged in a subterfuge search, purporting to be interested in investigating one crime or one type of evidence but in fact seeking to investigate another crime or obtain another type of evidence. Yet, as this case makes clear, the inadvertence requirement would cast doubt on the validity of searches that no court would characterize as the products of pretext or subterfuge. See LaFave, *supra*, at 356 ("good faith would not be absent merely because the police neglected to add other items to the search warrant for which probable cause existed"). Accordingly, if the Court is concerned with subterfuge searches, it should address that concern directly when the appropriate case arises. It should not, we believe, adopt a rule such as the inadvertence requirement, which does nothing to protect legitimate Fourth Amendment values and results in the unnecessary exclusion of probative criminal evidence.

2. Petitioner contends (Br. 11-13) that the decision below effectively reads the warrant requirement out of the Fourth Amendment. That is not so. The police were obliged to—and did—obtain a warrant to enter petitioner's house. They were authorized to search only in places where it was reasonable to believe that the items listed in the warrant might be located. And they were required to conclude their search once they found the items listed in the warrant. In short, the warrant authorized the entry into petitioner's house and defined the scope of the search. That result fully respects the language and purposes of the Warrant Clause.

3. Finally, petitioner maintains (Br. 12-13) that the inadvertence requirement is needed to avoid converting warrants for specific items into general warrants. The plain-view doctrine, however, already

takes that concern into account, without the need for the inadvertence rule. The danger that the police will use a warrant to rummage at will "is averted by strict attention to two of the core requirements of plain view: seizing the item must entail no signifiicant additional invasion of privacy, and at the time of seizure the officer must have probable cause to connect the item with criminal behavior." *Texas* v. *Brown*, 460 U.S. at 748-749 (Stevens, J., concurring in judgment). Here, the police had probable cause to seize the evidence of petitioner's crime, and they found that evidence without invading petitioner's privacy beyond the extent authorized by the warrant. Accordingly, the seizure of evidence in this case did not violate the Fourth Amendment.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

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No. 88-7164

In The
Supreme Court of the United States
October Term, 1989

TERRY BRICE HORTON,
Petitioner,

--against--

THE STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION, INC., IN SUPPORT OF THE RESPONDENT.

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This brief is filed pursuant to the Rules of the United States Supreme Court. Consent to file has been granted by Counsel for the Petitioner and the Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over eighty times in the Supreme Court of the United States, and thirty-eight times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), Inc., is the largest organization of sheriffs and jail administrators in

America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

ARGUMENT

THIS COURT SHOULD ADOPT A BRIGHT LINE RULE FOR THE PLAIN VIEW SEIZURE DOCTRINE BY ELIMINATING THE REQUIREMENT OF INADVERTENCE, OR, IN THE ALTERNATIVE, HOLDING THAT SUCH REQUIREMENT IS SATISFIED BY THE LACK OF PRETEXT AND OBJECTIVE REASONABLENESS.

Amici are professional organizations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of obtaining and executing arrest and search warrants, making warrantless arrests and searches, including plain view seizures, conducting interrogations, and investigating reports of crimes on and off premises, and (2) prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our members, and the composition of our membership and directors--including active law enforcement administrators and counsel--we possess direct knowledge of the impact of

the ruling of the court below, and we wish to transmit that knowledge to this Court.

Amici will not discuss at length the case law analysis of the Respondent State of California in this case, although we agree with that analysis. Instead, we will concentrate upon policy issues raised by this case and our need as law enforcement administrators to ensure that law enforcement officers have sufficient guidance in the area of Fourth Amendment jurisprudence.

In view of our close involvement with the police community, *amici* know that police officers enter private homes for a variety of lawful reasons--e.g., to serve a warrant, to answer a call of distress, to take a routine report, or to render another service. Often they are confronted with situations similar to that presented in the instant case of contraband or evidence in plain view and must make decisions concerning the seizure of such evidence.

The situation is graphically presented by the instant case. Police officers had obtained a search warrant for Petitioner's (hereinafter called defendant) premises for evidence in connection with an armed robbery. The warrant listed various items of personal property taken in the robbery. Through the inadvertence of an assistant prosecutor, the warrant failed to list various weapons (including an Uzi machine gun and stun guns) used by the defendant in the commission of the robbery, although the police clearly had probable cause for such items and had requested that they be included in the warrant. When they served the warrant, they seized the weapons and other items inadvertently left out of the warrant by the assistant prosecutor, as well as the items that had been listed in it.

The court below, in an unpublished opinion, approved

the seizure of the unlisted items as contraband and evidence in plain view. Following California precedent, *North v. Superior Court,* 8 Cal. 3d 301 (1972), the court ruled that the inadvertency requirement derived from *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), was not constitutionally required and was not binding on the California court.

I. THE PROBLEM

In *Coolidge* this Court sought to define the requirements for a species of warrantless seizure known generally as the "plain view doctrine." Under the doctrine as commonly understood, the police may seize contraband or evidence in plain view if (1) they are in a place where they have a right to be (*i.e.,* a constitutionally protected status), (2) the view or sighting is "inadvertent," and (3) they have probable cause to believe that what they seize is contraband or evidence of a crime. The latter element was sought to be clarified by this Court in *Texas v. Brown,* 460 U.S. 730 (1983).

The problem with the doctrine--as well illustrated by this case--is that the inadvertency aspect was not a holding of the Court in *Coolidge.* Only four Justices joined in this requirement. In fact, more recently in *Brown* a majority of this Court agreed that the facts of that case illustrated a plain view seizure, but only a plurality was able to agree on a definition of the doctrine, a continuing problem noted by some authors of texts used for police training. Inbau, Thompson, Zagel and Manak, *Criminal Law and Its Administration* (5th Ed., 1990), p. 1079.

The result has been confusion in the courts and confusion in police training academies. The respected commentator Wayne R. LaFave has noted that the

inadvertency aspect is not binding precedent of this Court, 2 LaFave, *Search and Seizure,* (2nd Ed., 1987), Sec. 4.11(d), p. 350, and many courts, while applying the inadvertency aspect for lack of clear guidance, have noted the plurality status of the requirement, *e.g., United States v. Santana,* 485 F.2d 365 (2nd Cir. 1973) and *United States v. Bradshaw,* 490 F.2d 1097 (4th Cir. 1974). As already noted, California has chosen not to follow the inadvertency requirement, noting that "'under settled doctrine, the judgment of an equally divided United States Supreme Court "is without force as precedent." ' " *North* at 308.

Amici can assure this Court that, based upon our many years of collective experience in law enforcement training, law enforcement officers have not received satisfactory guidance on the plain view doctrine in general and the inadvertency aspect in particular. Plurality opinions, while understandably valid in jurisprudence, are somewhat ineffective when police officers are confronted with evidence/contraband and *must make a decision* to seize or not to seize. Unlike lawyers and judges, law enforcement officers cannot always subject hard decisions to unhurried reflection and analysis. They need guidance in making such decisions quickly and under pressure. The plurality status of the inadvertency rule is impossible to teach, difficult to understand, and most inadequate to apply in the field of real world law enforcement activity.

The inherent problems of the legal status of the rule, however, is not what mainly concern *amici.* This Court could very easily resolve them by *ruling* in the instant case that inadvertency *is* constitutionally required, but *amici* urge that prior precedents of this Court, as well as good policy reasons, dictate an opposite course.

II. THE SOLUTION

This Court has for many years taken the position that the guiding purpose--indeed the central rationale--for the Fourth Amendment exclusionary rule is the deterrence of police misconduct, and that without deterrence the rule is not to be applied. *United States v. Leon,* 468 U.S. 897 (1984); *Stone v. Powell,* 428 U.S. 465 (1976); *United States v. Peltier,* 414 U.S. 338 (1975); *United States v. Calandra,* 414 U.S. 338 (1974); *Michigan v. Tucker,* 417 U.S. 433 (1974). Indeed, as the Court reiterated in *Leon,* 468 U.S. at 908, "'as with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.'"

The facts of this case clearly indicate a non-deliberate omission of the seized evidence from the warrant, as well as the lack of pretext or bad faith on the part of the law enforcement officers. As in *Massachusetts v. Sheppard,* 468 U.S. 981 (1984), the error was not that of the police. Both the prosecutor and police acted in objective good faith. Accordingly, if there were error in executing the search warrant and seizing the evidence, it should not result in suppression of the evidence under the rationale of *Leon* and prior cases.

Amici submit that a better reasoned approach to the problem presented by this case and others like it is for this Court to adopt a bright line rule for police guidance as *amici* urged this Court to do in *New York v. Belton,* 453 U.S. 454 (1981), and several other cases since then. **This rule should not require a showing of inadvertency,** *because* **if the police are in a place where they have a constitutional right to be** (as, for example, in the instant case pursuant to a search warrant), **and they have probable cause to believe that what they see is contraband or evidence of a crime** (likewise the instant

case), **their conduct would be objectively reasonable and suppression of the evidence would not serve to advance the *deterrence* goal of the exclusionary rule.**

Such a rule, we submit, would be uncomplicated for the courts to apply. The constitutional status of the officer's presence and the issue of probable cause can be objectively established without probing the subjective element of whether the officer had an *a priori* belief that the evidence would be found.* The need for assessing the credibility of the officer on subjective issues would thus be eliminated. Such a rule would not only provide guidance but streamline as well the task of suppression hearings and appellate court review.

III. AN ALTERNATIVE

In the alternative, if the Court believes that inadvertency advances the objectives of the exclusionary rule and should be retained and made a clear-cut holding of the Court, we submit that **a showing of inadvertency should be established by two elements: (1) a lack of pretext in the police conduct regarding their presence at the place where the observation is made, and (2) objective reasonableness in their conduct.**

Both elements can be established satisfactorily as mixed issues of fact and law.

Law enforcement administrators are charged with the

*Indeed the inadvertency element is a most ephemeral one, and should, we submit, be avoided by the courts. An officer's belief that *some* evidence will be found in a particular place is almost always present. Such belief can range from a hunch to clear-cut probable cause. As LaFave has noted, this Court has never attempted to define inadvertency. The reason is apparent: the element is so highly subjective that an objective standard is largely impossible. *Amici* submit that the element of inadvertency should be deleted from the doctrine.

duty of adopting and implementing policies and procedures that protect not only the constitutional rights of citizens during the performance of law enforcement functions, but also give law enforcement officers meaningful, helpful guidance. To that end, law enforcement agencies should be encouraged to adopt and implement professional standards and policies that incorporate these concerns. AELE, IACP, NDAA, and NSA encourage the adoption of model standards and policies for their respective constituencies. A model policy incorporating the rule advanced by *amici* will be consistent with this Court's goal of advancing the deterrence rationale of the Fourth Amendment exclusionary rule.

CONCLUSION

Amici submit that a clear pronouncement by the Court on this issue will greatly encourage the promulgation of law enforcement practices and policies that will not only protect the constitutional rights of our citizens, but will also give adequate guidance to the police.

ACCORDINGLY, WE URGE THIS COURT TO ADOPT A BRIGHT LINE RULE FOR THE PLAIN VIEW SEIZURE DOCTRINE ELIMINATING THE REQUIREMENT OF INADVERTENCE, OR, IN THE ALTERNATIVE, THAT SUCH REQUIREMENT IS SATISFIED BY THE LACK OF PRETEXT AND OBJECTIVE REASONABLENESS.

Amici respectfully request this Court to affirm the decision of the court below on the basis of law and sound policy, and to adopt the bright line rule put forward herein.

Respectfully submitted,

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